Supreme Court, U. S.
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No. 74-1477

In the

# Supreme Court of the United States

OCTOBER TERM, 1974

FAST MOTOR SERVICE, INC.,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee,*

and

INTERSTATE COMMERCE COMMISSION,

*Intervening Appellee.*

On Direct Appeal From The United States District Court
For The Northern District Of Illinois
Eastern Division.

## JURISDICTIONAL STATEMENT

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FAST MOTOR SERVICE, INC.,

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INTERSTATE COMMERCE COMMISSION,

*Intervening Appellee.*

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On Direct Appeal From The United States District Court
For The Northern District Of Illinois
Eastern Division.

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## JURISDICTIONAL STATEMENT

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Appellant, Fast Motor Service, Inc., appeals from the judgment of a statutory Court of three judges convened in the United States District Court for the Northern District of Illinois, Eastern Division, in Civil Case No. 73 C 1182, dated and entered March 25, 1975. The decision and order underlying said judgment also embraced *Fast Motor Service, Inc.* v. *United States, et al.*, Civil Case No. 73

C 3022, which the Court considered a related case,[1] and which is also being appealed to this Honorable Court. Appellant sought judicial review of an order of the Interstate Commerce Commission. This statement is submitted to establish the jurisdiction of this Honorable Court and to show that the questions presented are substantial and warrant a plenary hearing.

## OPINIONS BELOW

The Report and Recommended Order of the Hearing Examiner of the Interstate Commerce Commission was not published. It is reproduced as Appendix "A" to this pleading.

The foregoing Report and Recommended Order was affirmed by Review Board No. 2 and Division 1 of the administrative agency. The affirming orders were not published. They are reproduced as Appendices "B" and "C" to this pleading.

The decision and order of the statutory court entering the judgment being appealed was entered on March 25, 1975. That decision and order, including the dissenting opinion of Judge Will, is reproduced as Appendix "D" to this pleading.

[1] The cases were handled as separate and distinct cases at the administrative level and it is submitted that it would be possible to sustain one case and reverse the other because of the different records which reflect different parties of record, different opinions, and so on. Although the District Court apparently treated them as related because of their same general nature and the same named parties being involved, it is submitted that joint consideration should not be made if it results in prejudice to any of the parties. In the disposition of this cause at the District Court level, prejudice appeared to have flowed to Appellant. In articulating its reasons for sustaining the ad-



## GROUNDS ON WHICH JURISDICTION IS INVOKED

1. *Nature of Proceeding.* Pursuant to appropriate statutory authority, 28 U.S.C. 2325, the Appellant sought to set aside an order of the Interstate Commerce Commission. The matter was properly resolved from a procedural standpoint by a statutory court.

The administrative proceeding involved a request by Appellant for a Permit to operate as a contract carrier by motor vehicle serving a major manufacturer of containers. The jurisdiction of the administrative agency arose pursuant to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b).

2. *The Judgment Below.* The judgment of the District Court was entered on March 25, 1975. Notice of Appeal to this Honorable Court was filed with the District Court on May 15, 1975 after appropriate service pursuant to the Rules of Practice. A copy of the Notice of Appeal and Affidavit of Service appears as Appendix "E" to this pleading.

3. *Jurisdiction of the Supreme Court.* This direct appeal is conferred on this Honorable Court by Sections 1253 and 2101(b) of Title 28 to the U.S. Code.

[1] (Continued)
ministrative decision the District Court at one point stated: "The plaintiff's failure to satisfy the other criteria listed in 209(b) is either self-evident or similar to the facts found in Case No. 73 C 1182". Since one of the issues raised in Case No. 73 3022 was the failure of the administrative agency to articulate its reasons for the decision, the District Court apparently resolved this problem by "equating" the two cases instead of requiring each to stand on its own basis.

Cases which Appellant believes sustains that jurisdiction include:

*I.C.C.* v. *J-T Transport Co., Inc.*, 368 U.S. 81 (1961)

*United States* v. *J. B. Montgomery, Inc.*, 376 U.S. 389 (1964)

*United States* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774 (1945)

## QUESTIONS PRESENTED

It is respectfully submitted that the following questions are relevant and material and are presented to this Honorable Court for its consideration:

1. Did the administrative agency impose a burden of proof respecting need for service which was not constant with the statutory requirements and which would effectively preclude a segment of the shipping public from being afforded a responsive for-hire motor carrier service?

2. Did the administrative agency, contrary to the decision of this Honorable Court in *I.C.C.* v. *J-T Transport Co.*, 368 U.S. 81 (1961), apply the criteria of Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), in such a manner that appellant was prejudiced?

3. Did the administrative agency ignore relevant factors or established standards resulting in a clear error of judgment?

4. Was the administrative decision so vague as to preclude the parties and the reviewing court from determining whether it was rational and supported by substantial evidence?

5. Was the administrative order rational and based on proper findings supported by substantial evidence?



## STATEMENT OF THE CASE

Appellant sought a Permit authorizing motor contract carriage between points in twenty-three states under a continuing contract with Continental Can Co., Inc.

At the oral hearing before the administrative agency, the appellant proposed to provide the shipper with a specialized type of equipment which was geared to handle the light and bulky containers and other freight shipped. This equipment would be dedicated or committed to the shipper's use.

In addition to dedicating equipment, appellant proposed to provide trained personnel for specific moves; spot equipment at plant and/or warehouse locations as required by the shipper; handle truckload and less-than-truckload shipments on 7-day, 24-hour basis; provide an unlimited and completely flexible multiple delivery and peddle service; and, supplement interstate service with intrastate service.

The shipper, which manufactures, ships, and receives a wide variety of container-related packaging items, and materials, equipment and supplies, operated 69 manufacturing facilities as well as over 150 warehouses in the twenty-three state area and had plans to open new facilities in the near future.

Shipments from the various facilities were made to diverse customer locations which were not static. In some instances a particular customer location was served by more than one facility and it was a common practice of the shipper to switch the business from one facility to another.

The materials, equipment, and supplies utilized by the shipper on its manufacturing process were also purchased

from various suppliers at diverse locations which also changed.

The shipper desired the services of the Appellant to take advantage of its specialized equipment which afforded the shipper miscellaneous cost savings, the potential to increase sales, and the minimization of administrative tasks.

The proposal of the Appellant to dedicate such specialized equipment and to secure the authority to carry all of the shipper's commodities in the broad territory involved was particularly attractive to the shipper because it experienced numerous service requirements of a recurring type but which were unpredictable in terms of when, where, and to what particular extent they might occur.

The shipper had peak period requirements which occurred annually, but at different locations, at different times, and with different intensity. The shipper received unexpected orders from new customers or special orders from existing customers which strained, exhausted or were beyond the ability of existing authorized carriage. Likewise, the shipper based on past experience anticipated that orders scheduled to be produced and shipped from one facility would be shifted to other facilities because of machinery breakdowns, scheduling problems and so forth. The shipper proposed to utilize Appellant on movements of this nature, and in order to do this it would be necessary to be able to have the flexibility to move the Appellant's dedicated fleet from one or more plants to other facilities when unpredictable needs arose.

The shipper also desired to have an experienced container carrier available to utilize at new plant openings, three of which were scheduled in the immediate future, and



to serve accounts which had exacting service requirements. The Appellant had such experience and it was contemplated that its service would be used on these type movements, the location of which did not remain static.

As a method or means of making the service economical and to facilitate the movement of the Appellant's specialized equipment to the points required, the shipper contemplated using the Appellant to handle such items as steel and miscellaneous supplies, as well as container loads which did not require the specialized equipment. It was not contemplated that the Appellant would be used as a prime carrier at any single facility carrying steady, projectable loads.

The shipper was utilizing various carriers at its numerous facilities including 16 of the 22 carriers which appeared in opposition to the grant. None of the carriers had authority which duplicated that sought by the Appellant. All of these carriers were common carriers. Each had limitations in respect to the commodities it could handle and/or the territory or points it could service. None of the carriers offered to dedicate specialized equipment to the supporting shipper and only two of the carriers had equipment even comparable to that operated by Appellant and required by the shipper. One of these carriers was in financial difficulty and ultimately went bankrupt. Two other carriers had similar equipment which would satisfy some, but not all, of the shipper's needs on the light and bulky freight. To varying extents, such carriers offered some of the same service features as Appellant, but not one single protesting carrier offered all of the service features proposed by Appellant.

Eight of the carriers adduced evidence of the type traffic hauled and the revenue derived from service ren-

dered to the supporting shipper. In many instances, the type traffic was not similar to that which the shipper contemplated would be tendered to Appellant. Shipper asserted that the traffic would be primarily new traffic or traffic diverted from its private carriage fleet and not traffic diverted from other for-hire carriers.

The shipper operated a private fleet and, despite its desire to minimize its use, was contemplating its expansion at one plant at least because of deteriorating for-hire service. The shipper anticipated that a denial of Appellant's application would result in a further expansion.

Shipper contemplated that it would initially tender Appellant 2,000 loads annually if the application were granted, although until the seasonal peaks occurred, the new plants opened, production breakdowns or other emergencies occurred, and special orders were received, it was impossible to pinpoint how many loads would be rendered at any single origin to any single destination or destinations.

An Examiner's Report and Recommended Order issued recommending the denial of the application on the basis that application of the statutory criteria of Section 209(b) to the facts of record did not establish that the proposed operation would be consistent with the public interest.

It was found that Appellant failed to meet its burden of proof because no detailed evidence was adduced concerning the Appellant's proposed role at each individual shipper location in terms of how, where and to what extent the proposed operation would be used; that the grant could have a material adverse effect on the specific carrier which ultimately went bankrupt and perhaps also adversely affect other carriers; that a denial would not adversely affect the shipper because the *status quo* would



be basically preserved; and, that the changing character of the supporting shipper's requirements (which were not mentioned in the decision) were not shown to be so numerous, so major or to occur with such frequency so as to make it an overriding matter.

The Report and Recommended Order was affirmed by Review Board Number 1 and Division 1 of the Interstate Commerce Commission, acting as an Appellate Division, which adopted the prior Report.

On review, the District Court upheld the administrative agency's finding that Appellant failed to prove its specialized service with particularity; that protesting carriers would suffer an adverse effect because they derived substantial revenues from serving the supporting shipper; that the shipper would not be adversely affected because it could continue to use other carriers; and that Appellant failed to show by substantial evidence that the changing character of the shipper's requirements justified the grant of an application.

In a dissent, District Judge Will concluded that the administrative agency's opinions and findings were neither rational nor supported by substantial evidence; that the burden of proof imposed was too rigid, contrary to the public interest and not required by the applicable statute or decided cases; that the finding of adverse affect on existing carriers was not supported by the evidence but resulted from an unlawful presumption; that the administrative agency's justifying the denial in part on the basis of the maintenance of the status quo was contrary to law; and that the administrative agency's finding in respect to the changing character of shipper's requirement was so vague as to preclude meaningful judicial review.

Appellant's Notice of Appeal followed.

## THE QUESTIONS ARE SUBSTANTIAL

The issues which have been presented to this Honorable Court are sufficiently substantial to warrant a plenary hearing.

(a) *The Proper Burden of Proof.* The first issue is one which transcends the immediate case and which will affect numerous future applications before the Interstate Commerce Commission as well as decisions of shippers as to whether to engage in unregulated carriage as opposed to regulated for-hire carriage.

In the administrative proceeding the administrative agency held that the appellant did not establish a need for its service because the evidence did not establish, in particular, the role of Appellant at each individual shipping location in terms of the number of loads which would originate at that precise point, to what territory the loads would move, and how Appellant would specifically provide the service.

The Appellant submitted voluminous evidence which showed the historical general shipping pattern of the supporting shipper and examples of the specific types of movements for which Appellant would be used if the application were granted. The type of movements involved, i.e., emergency movements and those requiring highly exacting service, precluded the shipper from predicting with specificity where and when they would occur, although the supporting shipper did indicate based on past experience the approximate number of movements which would occur.

The service proposed by the Appellant and desired by the shipper contemplated flexibility so that the specialized service would be available when and where the need arose



within the territory and to meet such needs when they became definable.

Although contract carriage envisions the sating of unpredictable and specialized shipping requirements, the administrative agency imposed a burden which would require that a contract carrier applicant, in a situation when multiple plants and/or origin points are involved, establish specifically how many vehicles would be used at each location, how many loads would be handled, to what specific points they would move and so on.

If the above burden of proof is allowed to stand, the effect would be to preclude contract carriers—as well as common carriers—from ever performing service for a shipper with a need for service to meet a reasonably estimated volume of emergency, special and unpredictable needs, where the exact time, place and individual magnitude of each individual movement is impossible to pinpoint in advance. This was recognized by District Judge Will in his cogent and sound dissenting opinion.

If this unreasonable, unconscionable, and irrational burden of proof is sustained, shippers such as the supporting one will be forced to resort to private carriage which is not consistent with our National Transportation Policy, and also, as noted by District Judge Will, such a burden ". . . would preclude shippers and contract carriers from obtaining and performing vital services and impose an inflexibility on the nation's truck transportation system which will not be in the public interest."

(b) *Application of the Statutory Criteria.* This Honorable Court had the occasion to consider the application of the statutory criteria governing contract carriage, 49 U.S.C. 309(b), in *I.C.C.* v. *J-T Transport Co.*, 368 U.S.

81 (1961). The decision, which has not been supplemented, has served as a useful guide to all parties in the motor carrier industry.

The instant cause affords this Honorable Court an opportunity to review and reaffirm the excellent findings made in the *J-T* decision and to clarify the legal principles in this area even further.

In the cause being appealed, for example, the administrative agency specifically found that the denial of the application would result in the *status quo* being maintained. This result is contrary to his Honorable Court's finding in the *J-T* decision that the aim of the Interstate Commerce Act is ". . . not to protect or achieve the *status quo,* but to establish a regime under which new contract carriage would be allowed if the distinct needs of shippers indicated it was desirable."

Likewise, in resolving the statutory criterion relating to the effect a grant could have on existing carriers, the administrative agency made a specific finding relative to only one carrier—a carrier which ultimately went into bankruptcy and which would not be effected by the grant. A Petition for Further Hearing to bring the above fact to the attention of the administrative agency was filed, but denied despite the fact that the finding as to all other carriers was indefinite and speculative.

A fair reading of the administrative decision clearly establishes that the administrative agency favored existing carriers and presumed injury to existing carriers even though this Honorable Court in the *J-T* case rejected the validity of any such presumption and prescribed a balancing test.



The instant cause affords an excellent vehicle for expanding and refining the principles expressed in *I.C.C.* v. *J-T Transport Co.* 368 U.S. 81 (1961).

(c) *Failure to Follow Established Standards.* In applying the rigid standard or burden of proof, the Commission acted inconsistent with its own standards and in so doing acted arbitrarily. This was also true in respect to its apparent rejection of certain evidence in resolving the issues under various parts of Section 209(b), 49 U.S.C. 309(b).

The instant case affords this Honorable Court an opportunity not only to rectify the error as it relates to Appellant's interest, but to clarify the obligation of the administrative agency in this area of law. Some consistency in administrative action is necessary or the administrative process would be one fraught with turmoil.

An applicant for motor carrier authority must have some reasonable basis to know in advance what burden of proof will be imposed within the context of his case. This constitutes fundamental fairness. In the instant cause, Appellant was subjected to a different standard.

Appellant cited numerous cases in pleadings filed in prior stages of this cause in which the Commission had held it was not essential to adduce specific information relative to need if the nature of that need is unpredictable. See, for example, *Umthun Trucking Co., Extension—Seven States,* 112 M.C.C. 860 (1971). In a recent case, the Commission approved an application even where specific information was available, but the shipper refused to disclose it because of competitive reasons. *Fleet Transport, Inc., Extension—Orthodichlorobenzene,* 112 M.C.C. 732 (1971), *aff'd sub nom Chemical Leaman Truck Lines, Inc.* v. *United States,* 324 F. Supp. 104 (D. Del. 1972).

The administrative agency should not be allowed to apply a different standard or burden of proof at its whim. The administrative agency was at least under an obligation to indicate why it departed from the standards used in other cases where the rigid burden was not imposed in similar factual situations. *Barrett* v. *United States,* 326 U.S. 179 (1945).

Likewise, there were numerous instances of evidence which the administrative agency overlooked or ignored in the resolution of the case which in effect bore on the standards or factors utilized to make the substantive decision. For example, in resolving the third statutory criteria, no mention was made of the testimony of the shipper relative to the expansion of its private fleet or its intent not to divert traffic. This type of evidence has become a standard consideration in such decisions. See, for example, *Continental Contract Carrier Corp.* v. *United States,* 311 F. Supp. 390 (C.D. Cal. 1970).

In *Meat Packers Express, Inc.* v. *United States,* 244 F. Supp. 642 (D. Neb. 1962) the administrative agency was reversed for this very reason, *i.e.,* the fact that the administrative agency on other occasions gave weight to factors to which it did not give weight in the involved cause.

In comparable cases, it is imperative that an administrative agency be precluded from changing the issues and ignoring rather than weighing and applying the evidence previously found to be material and relevant unless there is some reasonable explanation for the departure.

(d) *Vagueness of Decision.* The ability of a court to review an administrative decision is dependent upon its ability to understand and decipher the basis on which it issued. *United States* v. *Chicago M., St. P. & P. R.R.,* 294



U.S. 499 (1935) This is particularly true in a situation such as here involved where the application of statutory provision is involved.

Unless an administrative agency is required to clearly state the reasons for its decisions, a reviewing Court is unable to ascertain whether it is supported by substantial evidence or is rational.

The above was recognized by District Court Will in his dissent as it related to the fifth statutory criterion of Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b).

In this cause the administrative agency, in determining the fifth criterion under Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), *i.e.,* the changing character of the shipper's requirements, concluded without any explanation that the ". . . changes were not shown to be so numerous, so major, or to occur with such frequency as to make it an overriding matter." No indication was given as to what changes were considered or not considered or why they were not major, numerous, or of frequent occurrence.

The proper resolution of each criterion under Section 209(b), 49 U.S.C. 309(b), is critical to the decision being properly resolved since the "balancing" which this Honorable Court deemed necessary in the decision in *I.C.C. v. J-T Transport Co.,* 368 U.S. 81 (1961), cannot be accurately done if any single criterion is being afforded too little or too much weight.

If the instant decision is allowed to stand, the administrative agency will be encouraged to frame its decision in a vague and general manner as it would tend to preclude reversal.

(e) *Rationality and Evidentiary Support.* It is important for this Honorable Court to determine if the evidence supports the finding in this case because the majority decision of the District Court evidences a complete failure to understand the issues, and consequently there was a failure to recognize an irrational application of the evidence to such issues.

For example, the District Court, excepting Judge Will, construed this Honorable Court's terminology in *I.C.C.* v. *J-T Transport Co.*, 368 U.S. 81 (1961), dealing with the necessity of an applicant providing it was "better equipped" than protesting carriers, as applying to the number of pieces of equipment operated by the Appellant *vis à vis* certain protesting carriers. This is clearly not the context in which this Honorable Court used the term.

The number of pieces of equipment operated by a carrier is only one criterion of its ability to serve a shipper. This criterion must be considered along with other relevant and material criteria including scope of operating authority, specific type service offered, competing demands on facilities and so on.

The administrative agency split each criterion from the other and never considered them in the overall context of the "nature of the service proposed". The reviewing Court committed this same fatal error and thus, to the extent it found that the administrative agency's finding had evidentiary support, a grievous error was made.

Not one single protesting carrier established that it had the requisite authority, equipment, services features, or ability to provide the service proposed or any substantial portion of it.



The administrative agency and the reviewing Court clearly failed to distinguish between the ability of the protesting carriers to meet the reasonable needs of the supporting shipper as opposed to its specialized needs despite the previous admonitions of this Honorable Court in *I.C.C.* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

If the decision is not corrected, it would not only be detrimental to the Appellant and its supporting shipper, but also result in other applicants for authority and parties in the administrative process being misled.

## CONCLUSION

The administrative decision which was sustained by the District Court, with a dissent, evidences a complete lack of responsiveness to the statutory concept of public interest.

There is absolutely nothing in the applicable sections of the involved statute or the decided cases which imposes the rigid standards applied and which would preclude shippers and contract carriers from obtaining and performing vital services.

To allow such standards to stand will impose an inflexibility on the country's transportation system which would not be in the public interest.

The administrative agency cannot regulate via mere alleged "expertise". The administrative agency as well as Appellant is governed by statute. This case involved the application of a statutory provision which is quite explicit as to what is to be considered.

The issue, unlike that articulated by the District Court, is not merely whether the administrative decision is sup-

ported by substantial evidence, but involves other questions such as whether the decision is constant with the statutory dictates and policy, whether the decision is rational, or whether the decision is arbitrary and capricious. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971).

These issues and the questions presented are of vital public importance in our economy and the administrative process.

Respectfully submitted,

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## APPENDIX A

INTERSTATE COMMERCE COMMISSION

Service Date
July 14, 1972

No. MC-126276 (Sub-No. 46)

FAST MOTOR SERVICE, INC., EXTENSION — 23 STATES

Decided .....

Application for a permit denied.[1]

James C. Hardman for applicant.

T. C. Clark, Walter Jones, Robert R. Kolthoff, John F. O'Donnell, John M. Veale, Edward G. Bazelon, Donald B. Levine, Donald W. Smith, Charles W. Singer, Patrick H. Smith, Daniel C. Sullivan, Frank J. Kerwin, Jr., Kermit M. Green, Robert C. Smith, R. W. Burgess, Christian V. Graf, N. Oakley Lewis, Ferdinand Born and John L. Gedid for protestants.

REPORT AND ORDER

Recommended By Morton B. Margulies, Hearing Examiner

By application filed February 26, 1971, Fast Motor Service, Inc. (Fast), of Hodgkins, Ill. seeks a permit

[1] Exceptions, if any, must be filed with the Secretary, Interstate Commerce Commission, Washington, D. C., and served on all other parties in interest within 30 days from the date of service shown above. Replies thereto maybe filed within 20 days after the final date for filing exceptions.

authorizing operations in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes of containers, container ends, closures and accessories, paper and paper articles, and plastic articles and materials, equipment, and supplies used in the manufacture, distribution and sale of the foregoing specified commodities, (except commodities in bulk or those which because of size or weight require the use of special equipment), between points in Colorado, Nebraska, Kansas, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Indiana, Ohio, Michigan, West Virginia, Massachusetts, Maryland, Delaware, New Jersey, Pennsylvania, New York, Connecticut, Vermont, New Hampshire, Rhode Island, Maine and the District of Columbia, under contract with Continental Can Company, Inc.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held at Chicago, Ill. on October 6, 7 and 8, 1971 and on February 22, 1972. The following appeared and presented evidence in oppositions: Virginia-Carolina Freight Lines, Inc., B & L Motor Freight, Inc., Leonard Express, Inc., St. Johnsbury Trucking Company, Inc., Graff Trucking Company, Inc., All-American Transport, Inc., C. W. Transport, Inc., Midwest-Emery Freight System, Inc., Kreyda Bros. Express, Inc., Miller Trucking, Inc., Dieckbrader Express, Inc., Schneider Transport, Inc., Associated Truck Lines, Inc., Jones Transfer Co., Key Line Freight, Inc., O. K. Motor Service, Inc., Fred Olson Motor Service Company, Lovelace Truck Service, Inc., McBride's Express, Inc., Hi-Way Dispatch, Inc., National Freight, Inc. and Hall's Motor Transit Company.

The filing of briefs was made optional with the parties. Briefs were filed by applicant and protestants Associated Truck Lines, Inc., Jones Transfer Company, Key Line Freight, Inc., Dieckbrader Express, Inc., Schneider Transport, Inc., Graff Trucking Company, Inc., All-American Transport, Inc., C. W. Transport, Inc. and Midwest Emery Freight System, Inc. Full consideration has been given to matters presented on brief.



Dieckbrader Express, Inc. and Schneider Transport, Inc. move again to dismiss the application and to strike certain evidence which requests were denied at the hearing. The basis for the request for dismissal of the application is applicant's "failure to have a written bilateral contract between the applicant and Continental drawn up and available for examination by protestants as part of the record in this formal proceeding." Protestants would have the application dismissed on the failure of applicant to conform to a procedure for which there is no requirement in the law. The case protestants cite to uphold their position, *Exley Express, Inc.* v. *U. S.*, 254 F. Supp. 363 is not in point. It treats with the right of a party under section 220(a) of the Act to examine a proposed contract already filed with the Commission It does not establish than an applicant for a permit must enter into a written bilateral contract with the supporting shipper by the time of hearing, which protestants would have applicant and Continental do. The motion to dismiss should be denied.

Protestants' motion to strike certain appendices to the written testimony of Continental's Central Region traffic manager and an exhibit sponsored by a corporate supervisor of distribution stating the quantity of glassware to be shipped from Clarksburg, W. Va. in 1971 and the mode of transportation to be used, should be denied. The appendices sought to be stricken showed such items as the number of truckload movements of tin plate that were destined to Central Region plants, examples of equipment, material and supply purchases, the movements of miscellaneous materials, equipment and supplies between Central Region plants on an annual basis, the projected 1972 shipments moving from the Central Region plants to the destination states involved, representative destination points shipped to and potential cost reductions obtained through the use of larger capacity vans. Protestants assert they were denied the ability to cross-examine on the documents because the underlying records

from which the documents were compiled were not made available. The record shows that the witnesses had sufficient personal knowledge about matters for which purpose the documents were offered, so that they were able to stand cross examination. The weight to be afforded the evidence is a matter separate from its admissability.

The general objection to the testimony of John Moosburger, district Supervisor of Central Region traffic, as "pure hearsay," which denied protestants the right to cross examine should be overruled. The witness had sufficient personal involvement in the matters testified to that he was able to stand cross examination to the degree necessary to qualify his testimony as admissable. Cross examination helped establish the degree of reliability the evidence had, and the weight it should be accorded. No rights of protestants were abrogated.

APPLICANT

Fast is a motor contract carrier primarily authorized to serve shippers in the containers producing industry. It has authority to operate in virtually all of the territory for which application is made. Applicant is headquartered at Hodgkins, Ill. and has facilities at Philadelphia, Pa., Cleveland, Ohio, Ashville, N.C., Atlanta, Ga., Indianapolis, Ind., Louisville, Ky., Minneapolis, Minn., Okmulgee, Okla., St. Louis, Mo. and Chicago, Ill. The carrier at the time of the initial hearing in October 1971 had contracts with seven shippers, only two of which were served under permanent authority. Continental Can Company (Continental) the supporting shipper herein was then being served under temporary authorities. It was awaiting the issuance of permit No. MC-126276 (Sub-No. 34) which authorizes the transportation of paper cups, and plates and plastic lids, cups, knives, forks and spoons from the plant site and storage facilities of Continental at Three Rivers, Mich. to points in Massachusetts, New Jersey, Maryland, New York, Pennsylvania, Rhode Island, Virginia, Connecticut, Vermont, Maine, North Carolina,



Georgia, Missouri and Kansas. Official notice is taken of the fact that on October 28, 1971 the permit was issued to Fast. Prior to the Sub-No. 34 grant, applicant under temporary authority to serve the shipper at Three Rivers, Mich. transported 3 to 4 truckloads daily. Fast since December 1970 has held temporary authority under MC-126276 (Sub-No. 36 TA) to transport metal containers and ends from the plant site of Continental at Elwood, Ind. to Jackson, Madison, Humboldt, and Nashville, Tenn., Kansas City and Trenton, Mo. and Kansas City, Kans. Two to 3 loads a day are transported by Fast pursuant to the authorization.

Fast has 22 trucks, 86 tractors and 207 trailers which are company owned. Forty six of the trailers have door openings and inside heights of 103 inches. The remainder have door openings of 111 inches and inside heights of 112 inches. The latter extra high cubic capacity trailers are in lengths of 43 and 45 feet.[2] They have sliding tandem axles which permit the vehicles to meet dock levels that are not at standard heights. Widths of all trailers are 92 inches to accommodate the carrying of 2 standard 44 inch pallets side by side. Twelve of the high cube capacity trailers have roller bed floors. In addition Fast has approximately 20 portable rollers. Applicant leases 20 tractor trailer units for use of a shipper not otherwise the subject of this report. Fast is in the process of designing a 45 foot possum belly trailer that will have loading heights of 144 inches to accommodate drums, of which Continenal is a shipper. It follows a safety program in its operations.

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[2] For purpose of this report a van with door openings and an interior height of less than 101 inches will be considered ordinary equipment. Trailers with door openings and interior heights of from 101 through 105 inches are considered high cubic capacity equipment. Those with door openings and interior heights in excess of 105 inches are designated as extra high cubic capacity trailers.

Fast uses some 20 tractors and 20 trailers to perform transportation for Continental. As with its other shippers, applicant allots a set number of pieces of equipment for the use of Continental but the equipment is not necessarily used exclusively in the service of each of its shippers. Equipment is employed in the service of its other shippers when it is operationally useful to do so. Applicant's president testified that during the course of the hearing he had become aware of what is required of a contract carrier by way of dedicating equipment to the exclusive use of a shipper and that applicant will do so in the future. It proposes to initially dedicate 40 tractors and 40 trailers in the service of Continental, the trailers to be the extra high cubic capacity vans it operates.

Applicant did not establish how much of its equipment is used in the service of other shippers. It leases equipment and earns a substantial portion of its revenue from other carriers. Its income statement for the 6 months ended June 30, 1971 showed it to have revenues of $1,433,818, of which $502,728 were intercity contract freight revenues $28,890 were local cartage freight revenues and $902,200 were from intercity transportation for other carriers. Approximately 30 tractors are trip leased to other carriers. Further details as to its leasing of vehicles was not given. The referred to income statement showed a net income of $100,773 before taxes for the 6 month period, on revenues of $1,433,818. Its balance sheet as of June 30, 1971 showed assets of $1,066,904, of which $216,721 were current assets, liabilities of $871,847, of which $443,893 were current liabilities and a net worth of $195,057. Included as a current liability were $260,039 for current equipment obligations.

Fast proposes to make its fleet available to the shipper where and when required. It would spot equipment at the shipper's facilities. Applicant would provide a delivery service with an unlimited number of stops and without route restrictions. Individual less than truckload shipments would be transported if Continental required it. Applicant would expect to transport such shipments when it had a vehicle moving in the direction of the shipment. Fast would make itself available for service seven days a week 24 hours a day. It would supply drivers experienced in the transportation of containers and capable of operating electrically operated roller equipment. Should the application be granted it would enter into a continuing bilateral contract with Continental.



Supporting Shipper

Continental is the largest producer of packaging in the United States. Its Metal Operations Group makes over 500 different type containers for beverages, foods, drugs, cosmetics, household products, oils and paints. Its Paper Group produces fibre drums, corrugated containers, pulp board, kraft paper, bags, cups and plates. The Plastics, Closure and Consumer Products Group manufactures cups, containers, plates, cups, spoons, knives and forks.

The territory sought in the application falls within the shipper's Eastern and Central Regions. Relative to the application, the Eastern Region encompasses Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, and the District of Columbia. The Central Region includes Colorado, Nebraska, Kansas, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Michigan, Indiana, and Ohio. Appendix 1 lists some 43 plants operating in the Eastern Region and Appendix 2 lists some 39 plants operating within the subject territory in the Western Region. Continental opened 6 new plants within the area of application in 1971 and expects to do the same in 1972. In addition to using motor carrier transportation to and from its plants, it utilizes such transportation to and from the approximately 120 warehouses it employs.

Based upon past and anticipated sales, Continental projects the movement in excess of 120,000 truckload shipments from its Eastern Region plants to points within the area of application in 1972. The shipments are to move by for-hire as well as by private carriage. The number of expected truckload shipments from each of the plants range from a low of 627 to a high of 13,217. Much of the production of the plants will be destined to points within the state where the producing plant is located. Shipments are also made to neighboring states and smaller quantities are transported to more distant states. Cans generally move locally, while can ends move longer distances. In the Eastern Region it is expected that a plant will ship its produce to an average of 9 states within the area of application, in addition to points in the states where the plant is located. The number of states outside of the producing state expected to be shipped to from the plants in the Eastern Region range from none to twenty. In the Central Region the number of shipments from the plants to points within the area of application was projected for 1972 at in excess of 160,000. An average of 11 states outside of the producing state are expected to be shipped to from the plants. The number of states outside the producing state that are expected to be shipped from the plants in the Central Region ranged from none to 21. It is not unusual for the shipper to shift points of production from time to time.

The plants within the territory sought receive inbound shipments of tin plate from mills and warehouses in Illinois, Indiana, Maryland, New Jersey, New York, Ohio, Pennsylvania and West Virginia. In 1970, more than 26,000 truckload shipments of tin plate were received by the plants. Tin plate moves primarily in sheets which is transported in vans. The plants, in addition, received 16,642 truckloads of inks, adhesives, coating, solvent, flux film, foil, machine parts, oven parts, skids, solder, paint boxes and cartons, all moving within the subject territory.



Continental ships its containers and corrugated products in palletized and unitized loads. The height of each pack depends upon the height of the individual item and the number of layers stacked in the pack. In loading vehicles, two pallets are placed side by side and pallets can be stacked atop one another depending on the height of the packs. Unitized packs are similarly loaded. By maximizing the use of the available space in an extra high cublic capacity trailer, by adding additional layers of product per pack or in the case of drums an additional tier, Continental can ship more of its products per extra high cubic capacity trailer than if it used ordinary equipment. Depending on the commodity, it can load anywhere between 14 and 28 percent more products in a 40 foot extra high cubic capacity trailer as compared to a 40 foot standard van. The percentage increases if a 43 or 45 foot extra high cubic capacity trailer is used as compared to a standard 40 foot trailer.

A principal reason for the shippers support of Fast is that it wants its transportation performed in extra high cubic capacity trailers. When Continental sells in trailerload quantities, it sells more of its product per trailer, if they are of extra high cubic capacity. The unit cost for the movement of its cans, drums and corrugated becomes less when extra high cubic capacity equipment is used. Also, with the larger trailers there is less chance of there being an overflow load, with the shipper cancelling the purchase of the overflow portion because of additional transportation charges. Not all customers order in sufficient quantities, nor do all receivers want their shipments aggregated so that the maximum capacity of an extra high cubic capacity van will be utilized. No figure was given as to how many extra high cubic capacity loads would move from any given point in any given time. Extra high cubic capacity equipment would provide no benefit for the movement of loads of caps, jars, cups, plastic bags and plastic film. Neither would it be more useful for the inbound transportation of materials, equipment and supplies except for the

transportation of boxes and cartons where the additional capacity could be used.

Another principal reason for its support of applicant is that it seeks a dedicated service. It would move the dedicated equipment to its various locations as peak seasonal needs for the transportation of its containers developed. No indication was given of the need for any particular number of pieces of equipment at any location at a particular time. It anticipates using applicant's service for problem and emergency shipments and those that have highly exacting service requirements. It would schedule applicant's equipment for round robin trips transporting product outbound from its plants and materials equipment and supplies inbound. With a dedicated fleet Continental expects to have greater flexibility in having its inbound shipments transported. It anticipates that applicant's service, available at all hours will result in expedited deliveries and cut down on the need for warehousing.

The shipper seeks a multiple stop service for the transportation of its corrugated and plastic containers, metal caps, closures, can ends and glass products which shipments involve an average of 3 stops. Spotting of equipment is looked upon with favor to cut down on dock congestion and to maximize the use of the time of loading crews.

Continental would tender traffic to applicant that resulted from new plant openings, from increased production resulting from production line changes and from new warehouse locations. It intends to use applicant primarily to meet specialized and changing needs. It will not use applicant as a prime carrier at any location unless existing carriers refuse to provide adequate service. Continental expects that the granting of the application will cut down on its need for its private carrier fleet. It operates 287 tractors and 700 trailers throughout the country. The shipper stations 50 to 60 tractors and 80 trailers in the Central Region. Should the application



be granted Continental would enter into a bilateral contract with the applicant and expects it will tender a minimum of 2,000 loads annually to it.

Continental uses the services of a number of motor carriers to perform transportation inbound and outbound from each of its locations. The numbers used range up to 50 to perform transportation at a plant. The shipper is generally dissatisfied with regular route carriers. The reasons given are: they can serve only limited points, service is performed through terminal locations and at specified hours, multiple delivery service is limited in terms of the number of stops and in the manner stops are made, extra high cubic capacity trailers with or without rollers are not normally available and the regular route carriers show limited interest in container traffic. Only National Freight, Inc. a regular and irregular route motor common carrier regularly supplies it in the Eastern Region with extra high cubic capacity vans. Fast utilizes the services of 5 irregular route specified commodity carriers in the Central Region that supply it with extra high cubic capacity equipment. It does not believe that the latter carriers are in a position to render it adequate service at its facilities because of commodity and territorial limitations in their certificates and the need for the extra high cubic capacity equipment by their other shippers.

Continental is dissatisfied with the service it is receiving from protestant Dieckbrader Express, Inc., who serves the shipper at Chicago, Ill., St. Louis, Mo., Van Wert, Ohio and Three Rivers, Mich. Within 2 months prior to the initial hearing, Dieckbrader Express, Inc. notified Continental that from Three Rivers, Mich. it would make delivery to points east of Interstate Highway 79 in Pennsylvania and points west of St. Louis, Mo. dependent on their ability to obtain a backhaul. If the shipper wants delivery in those areas by a specific date, it would have to pay rates on the basis of exclusive use of the vehicle. Dieckbrader invoked the condition on a

movement to Kansas City, Mo. and to North Lawrence, N. Y. Dieckbrader is not the shipper's prime carrier to Kansas City and was only called because of an equipment shortage. To serve Kansas City, Dieckbrader must tack authorities and circuity is involved. Continental uses its private carrier fleet at Three Rivers to a great degree.

Continental supported Dieckbrader for authority to serve its drum facilities at Tonawanda, N. Y. to points in Pennsylvania, Ohio and West Virginia. It discontinued using the service because protestant was not making scheduled deliveries into Ohio. As a result Continental uses a non-protestant carrier that does not supply it with extra high cube trailers. The shipper would use Fast on shipments of fibre drums outbound from Tonawanda, N. Y. with movements of materials, supplies and equipment on return to the Tonawanda area.

Continental finds Dieckbrader's service deteriorating at Van Wert, Ohio where it transports 85 percent of the shipments from the fibre drum plant there. The movement is principally to the Chicago, Ill. area and involves 20 to 30 truckloads a day transported by Dieckbrader. Complaints as to service involve a shipment made from Van Wert on February 8, 1971 which was delivered in Milwaukee, Wis. on February 17, 1971. Continental has what it terms "a minimum number" of truckload shipments moving to points in Wisconsin north of Milwaukee and to points in the northern part of the Lower Peninsula of Michigan. Dieckbrader wanted to apply charges to points in those areas on an exclusive use of vehicle basis. It was resolved not to, but Dieckbrader requested that if all possible other carriers be contacted first for servicing the area.

During the week of July 18, 1971, Dieckbrader delivered 8 shipments in Chicago which were late from several hours to 3 days. Time was of the essence in the movements and this caused dissatisfaction on the part of Continental's customers. There were a number of other



shipments delivered later than initially scheduled but the receivers acquiesced in the late deliveries. An inter office memo of the shipper noted that the difficulties during the week were not in character for the carrier which has rendered reliable service throughout the years. On July 30, 1971, a shipment that was to be delivered early morning because of the receiver's needs was delivered at 3:14 p.m. The day before the hearing Dieckbrader could not supply Continental with 12 forty five foot trailers at the Van Wert plant, in addition to the 15 it did furnish. Whether they were eventually obtained to perform the transportation is unknown. The shipper further complains it is difficult to settle claims with Dieckbrader. Continental utilizes its private carrier fleet at Van Wert. As with its use at other locations, it would prefer to curtail it rather than have it grow. Six of its trailers are usually kept at Van Wert.

Continental would use Fast at its Clarksburg, W. Va. plant which produces ash trays, glasses, mugs, punch bows, pitchers, percolator tops, plates, jelly and jam jars and fuse plugs. The Clarksburg plant is its only one producing glass items. The products move in mixed loads except for promotional glassware which is shipped in straight loads. The latter constitutes 15 percent of the transportation. Twenty six hundred truckloads of the glassware were projected to be shipped from Clarksburg in 1971 moving to population centers in the Eastern and Central Regions. Twenty eight thousand pounds was figured to constitute a truckload. Fifty percent of the shipments from Clarksburg move in the last 10 days of the month. Because of the increased demand for transportation during the period Continental uses its fleet to supplement common carrier service. Some 10 to 15 carriers provide service at Clarksburg and Continental has 17 tractors and 18 or 19 trailers in use there. Its own equipment is also used to provide service where single line service is not available. The shipper seeks to have applicant's extra high cubic capacity trailers made avail-

able at Clarksburg where it would be used during rush periods. With the extra capacity of the vans it expects it can increase loadings by 20 to 30 percent per vehicle over what it is loading on vehicles presently supplied to it.

In 1970 the Central Region supported carriers in 7 instances for emergency temporary authorities. Continental complains that although protestants Virginia-Carolina Freight Lines, Inc. and Hall's Motor Transit Company supply it with high cubic capacity equipment they do not provide the extra high trailers. Lovelace Truck Service, Inc. makes available a wedge shaped trailer which Continental does not consider suitable for its higher packs. All-American Transport, Inc. is said not to be interested in transporting any shipments that require extra high cubic capacity equipment. Neither Leonard Express, Inc. or C. W. Transport, Inc. would furnish the desired equipment. Some carriers such as Hall's Motor Transit Company would provide extra high cubic capacity trailers, if guaranteed a sufficient volume of traffic.

Continental acknowledged it has sufficient extra high cubic capacity equipment for movement of its products from the Eastern Region to New England, as well as in the remainder of the Eastern Region which National Freight, Inc. can serve. The shipper states it has sufficient carrier service in the transportation of materials, equipment and supplies in the Eastern Region.

PROTESTANTS

Hall's Motor Transit Company, of Mechanicsburg, Pa. is a motor common carrier of general commodities, over irregular and regular routes in an area generally bounded by Rochester, N. Y. in the north, New York, N.Y. in the east, Charleston, W. Va. in the south and Cleveland, Ohio in the West. Its authority extends to points in New York, New Jersey, Pennsylvania, Delaware, Maryland,



Ohio, West Virginia and the District of Columbia. Protestant, with Commission approval, controls under temporary authority Standard Motor Freight, Inc. of Pittsburgh, Pa., a motor common carrier of general commodities over irregular and regular routes in Ohio, West Virginia and Pennsylvania. The Commission has authorized a permanent acquisition. Protestant is authorized to serve virtually all of the shipper's plants in the Eastern Region and those in Cleveland in the Central Region.

Hall's Motor Transit Company has 39 terminals within the territory set forth above. It operates 277 trucks, 910 tractors and 1,826 trailers. Included among the trailers are 141 forty foot vans with door openings of 103 inches and inside height of 107 inches, 50 forty five foot vans with door openings of 101 inches and inside heights of 103 inches and 75 forty five foot vans with door openings of 92 inches and inside heights of 94 inches. It has a few rollers. Protestant performs transportation to and from Continental's plants and warehouses in the Eastern Region Transported are such commodities as containers, can ends, boxes fibre drums, glassware, bottle caps, tin plate, paper cups, plastic, bottle, machines and sheet steel. In the period January 1, 1971 through September 11, 1971 protestant transported 1,815 shipments for Continental weighing 14,196,000 pounds for revenues of $198,586. The Tonawanda, N.Y. and Clarksburg, W. Va. plants were served during the period. From Clarksburg it transported shipments of glassware weighing up to 39,000 pounds a truckload. In July 1971 there were 25 shipments from Clarksburg weighing 737,120 pounds. Hall's Motor Transit Company was regularly requested to make scheduled deliveries and there is no evidence of complaints as to its service. It makes an additional change for Saturdays, Sunday & holiday deliveries. Truckload and less-than-truckload traffic is transported and stop offs are made. It regularly spots equipment. Protestant is opposed to approval of the application because of a possible diversion of its existing traffic.

National Freight, Inc., of Vineland, N. J. is a motor common carrier authorized to transport general commodities over regular and irregular routes to and from points and places in Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland and the District of Columbia. It can tack its general commodity authority at Mays Landing, N. J. to transport glass containers and paper containers to points in Illinois and Ohio; and at Winslow Township, Camden County, N. J. to transport plastic products and materials, supplies and equipment used in the production, distribution and installation of the commodities between Winslow Township on the one hand, and, on the other, points in Maine, New Hampshire, Vermont and the District of Columbia. It operates 522 tractors and 1,653 trailers. They include 100 forty-five foot trailers acquired 2 months prior to the hearing primarily for use by Continental. They are wedge shaped trailers with door openings of 113¾ inches and inside heights narrowing down to 108¾ inches at the front end. Another 100 such trailers are on order with delivery to begin in October 1971. In addition National Freight, Inc. operates 700 forty-five foot trailers with door openings of approximately 100 inches with inside heights of 105 to 107 inches.

Protestant transports for Continental principally in New York, New Jersey, Pennsylvania and Maryland. In the period January 6, 1971 through August 31, 1971 it transported some 700 shipments for Continental weighing in excess of 13 million pounds for revenues of almost $200,000. Shipments included cans, can ends, cartons, labels, caps, tin plate and machine parts. It offers a service seven days a week 24 hours a day. It will spot equipment. National Freight, Inc. opposes the granting of the application because of fear of losing existing traffic.

Hi-Way Dispatch, Inc., of Marion, Ind. is a motor common carrier authorized to transport specified commodities over regular and irregular routes in the mid-



west. Ninety-five percent of the transportation it performs is of glass containers. It cannot originate such shipments at Clarksburg, W. Va. Its authority authorizes it to originate shipments at specified points in Indiana, Illinois and Wisconsin and transport them to points and places in Wisconsin, Kentucky, Missouri, Illinois, Michigan, Ohio, and Indiana. Some of the authority has plant site restrictions. It does not serve Continental. Protestant operates 49 tractors and 102 trailers, an unspecified number of the latter being of extra high cubic capacity. It stations equipment at the glass plants it serves. The interest of Hi-Way Dispatch, Inc. is to have any authority granted to applicant to transport glass containers restricted to shipments originating at Clarksburg, W. Va. Its concerns is that Continental will purchase the plants of protestant's existing accounts and that it will lose the business to Fast should the application be granted. It would want to perform transportation for Continental at any new plants or warehousing operations it started within protestant's authorized territory.

Krevda Bros. Express, Inc., of Gas City, Ind. is a motor common carrier specializing in the transportation of glass containers, which constitutes 98 percent of its business. It can transport glass containers from points and places in Indiana, Pennsylvania, Wisconsin, Kentucky and Illinois to points and places in Indiana, Wisconsin, New York, Missouri, Michigan, Iowa, Kentucky, Connecticut, Massachusetts, Delaware, Maryland, Illinois, Ohio, New Jersey, West Virginia and the District of Columbia. It operates some 65 tractors and 94 trailers. It is in the process of acquiring 45 forty-five foot trailers with inside heights of 110 inches. Ten of the new trailers are replacements for those traded from its fleet. Protestant has no authority to originate shipments at Clarksburg, W. Va. It has transported an unspecified amount of traffic originating at Clarksburg by interlining with other motor carriers. The interest of Krevda Bros. Express, Inc. in the application is same as that of Hi-Way Dispatch Inc. It too would be satisfied if any grant of glass con-

tainer authority were restricted to shipments originating at Clarksburg.

Leonard Express, Inc., of Greensburg, Pa. is a motor common carrier of general commodities over regular and irregular routes operating in Connecticut, New Jersey, New York, Ohio, Pennsylvania and West Virginia. It operates 24 hours a day, seven days a week. It spots equipment, makes scheduled pickups and deliveries and multiple stops. Protestant operates 148 tractors and 307 trailers of which approximately 100 trailers have door openings of approximately 99 inches and inside loading heights of 103 inches. It also leases 92 tractor trailer combinations. For Continental it transport tin cans, metal containers, caps, steel and machinery. In the period July through December 1970 protestant transported from Passaic and Patterson, N. J., Wheeling, W. Va. and West Mifflin, Pa. 128 shipments, weighing 1,204,719 pounds for revenues of $25,994. Protestant is not using its equipment fully and is desirous of transporting additional traffic for Continental.

C. W. Transport, Inc., of Wisconsin Rapids, Wis., is a motor common carrier of general commodities over regular and irregular routes, authorized to operate in the Upper Peninsula of Michigan, Wisconsin, Illinois, Indiana and Ohio. It utilizes in its operations 512 tractors and 680 van trailers the latter having door openings of up to 102 inches. Protestant serves the shipper from Chicago, Ill., Elwood, Ind., Milwaukee, Wis. and Cincinnati, Ohio. It transports containers, materials and supplies for Continental. Shipments from Elwood, Ind. were destined primarily to Milwaukee, Wis. In August 1971 C. W. Transport, Inc. transported 93 shipments from the aforementioned origins weighing in excess of 2 millions pounds. Protestant offers to spot equipment at the shipper's facilities. The carrier believes that granting of the application will result in a diversion of traffic.

Virginia-Carolina Freight Lines, Incorporated, of Martinsville, Va., is a motor common carrier authorized



to transport general commodities within New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, North Carolina and the District of Columbia. It operates 200 tractors and 286 van trailers a majority of which are 45 foot in length. Door openings are up to 101 inches. Protestant provides service 24 hours a day, seven days a week. It spots equipment for shippers and has done so for Continental. It serves the shipper's can plant at Baltimore, Md. on a daily basis and sporadically transports for it between Reading, Pa. and Logan, W. Va. Four percent of its gross revenues are obtained from serving Continental. The commodities it transports include containers, paper drums and component for fibreboard drums. From time to time Continental has requested that protestant supply it with extra high cubic capacity equipment, which request has not been fulfilled. Protestant fears that granting of the application will result in a diversion of traffic.

St. Johnsbury Trucking Co., Inc., of St. Johnsbury, Vt. is a motor common carrier of general commodities primarily over regular routes which extend through the New England States and into New Jersey, Pennsylvania and New York. It operates 494 tractors and 1108 trailers of which over 700 are 45 foot in length. Door openings and inside heights are just under 98 inches. As representative of the traffic protestant transports for the supporting shipper it submitted an abstract of 12 shipments of cans it transported in the period February 1, 1971 to February 12, 1971 from Alton, N. Y. to Onset, Mass. The shipments weighed a total of 126,954 pounds. In the period another abstract showed it transported for the shipper 17 shipments of paper cups, plates and dishes, in the period March 1, 1971 through March 26, 1971 from Worcester, Mass. to points in Maine, New Hampshire, Vermont and New York. The shipments weighed 34,849 pounds.

Key Line Freight Inc., of Grand Rapids, Mich. is a motor common carrier of general commodities, over regu-

lar and irregular routes operating generally between points in southwestern Michigan on the one hand, and, on the other, points and places in Minnesota, Wisconsin, Iowa, Illinois and Indiana. It operates almost 200 over the road tractors, 589 van trailers and 80 flatbed trailers. Protestant has 40 forty foot trailers with door openings of 103 inches and inside heights of 106 inches and 20 forty foot trailers with door openings of 105 inches and inside heights of 106 inches. Key Line Freight, Inc. serves Continental from Milwaukee, Wis., Benton Harbor and Shoreham, Mich. and St. Louis, Mo. in the transportation of containers and material and supplies. From the 3 origins in the first nine months of 1971 it transported 124 truckload and less than truckload shipments, weighing in excess of 2 million pounds for revenues of $26,356. Protestant considers the revenue as important as well as the factor that the traffic helps to balance its operations. Its gross revenues for 1971 were approximately 18 million dollars.

Schneider Transport, Inc., of Green Bay, Wis., is a motor common carrier specializing in the transportation of metal containers and container ends. It holds authority to transport metal containers, container ends and accessories and materials and supplies used in connection with their manufacture from Chicago, Ill. to points in the states sought in the application except Colorado, Vermont, New Hampshire and Maine. Protestant operates 540 tractors and 945 trailers, of which 500 are 45 foot in length with door openings of 111 inches and inside heights of 113 inches. The carrier operates 24 hours a day, seven days a week, makes scheduled pick ups and deliveries and spots equipment. It has solicited the shipper for traffic but no shipments have been obtained. It has unused vehicle capacity from Chicago. Protestant is concerned that in time applicant will convert any authority granted to common carrier authority and jeopardize the other container industry accounts it has. Total revenues of Schneider Transport, Inc. were approximately 23 million dollars in 1971.



Midwest-Emery Freight System, Inc., of Chicago, Ill. is a motor common carrier of general commodities, over regular and irregular routes, in an area generally extending eastward from Colorado and north of the Mason-Dixon line. From Clarksburg, W. Va. it is authorized to transport general commodities to all of Ohio, the northern half of Indiana, the Chicago area in Illinois and by tacking to other regular route authority to specified points and places in Wisconsin, Minnesota, Iowa, Nebraska, Colorado and Connecticut. It operates over 1000 tractors, 156 flatbed trailers and 427 van trailers which include an unspecified number of 45 foot trailers with 108 inch door openings. It presently serves the shipper primarily in the transportation of tinplate from Weirton, W. Va. and Steubenville, Ohio and of aluminum cans from Patterson, N.J. to Cincinnati, Ohio. In the period November 1, 1970 through October 31, 1971 it transported 339 shipments, weighing over 11 million pounds for revenues of $103,521. The carrier operates seven days a week, 24 hours a day. It would spot equipment and acquire extra high cubic capacity trailers if the volume of traffic warranted it. It opposes the granting of the application because of possible diversion of its existing traffic and fears that applicant will convert any authority granted to a certificate of public convenience and necessity which could further affect its operations. Midwest-Emery Freight Systems, Inc. had gross revenues of approximately 54 million dollars in 1970.

Associated Truck Lines, Inc., of Grand Rapids, Mich., is a motor common carrier of general commodities primarily over regular routes. Its operations extend from the Chicago, Ill. area in the west through the Lower Peninsula of Michigan, most of Indiana, northern Ohio and east to Pittsburgh, Pa. It routes extend south to Louisville, Ky. Protestant operates 1150 tractors, 166 flatbed and 1504 van trailers. One hundred of the van trailers are 45 foot in length and have door openings of 96 inches. It serves Continental from West Mifflin, Cleveland and Sharonsville, Ohio, Chicago, Ill., and Three

Rivers and Detroit, Mich. In the period June, July and August, 1971 it transported some 40 shipments of containers, boxes, cups and plates for the shipper weighing 257,159 pounds for revenues of $6,843. Associated Truck Lines, Inc. grossed approximately 48 million dollars in 1971.

It was stipulated between counsel for applicant and counsel for Jones Transfer Company, of Monroe, Mich., that if a witness were to testify for the latter the testimony would be that protestant is a general commodity carrier who by virtue of its control of W.W. Express, Inc. operates between all points in Ohio on the one hand, and, on the other points in southeastern Mich. Two hundred fifty four tractors and 787 trailers are operated.

B & L Motor Freight, Inc., of Newark, Ohio is a motor common carrier of specified commodities over irregular routes. It is authorized to transport various kinds of beverage containers, glass containers and plastic containers between specified points and places within an area extending from Wisconsin to Massachusetts and paper, paper articles and such articles and supplies as are used in the manufacture of paper and paper articles between Rittman, Ohio, on the one hand, and on the other points in specified areas of New York, Pennsylvania, Michigan and those in Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, Delaware, Indiana, Wisconsin, Illinois, Missouri and the District of Columbia. It also is authorized to transport pulpboard, paper boxes, and corrugated paper products used in the manufacture of such commodities from Pittsburgh, Pa. to points in Ohio, West Virginia and a specified portion of New York. Protestant operates 217 tractors and 985 van trailers. It has on order 224 forty five foot trailers with door heights of 110 inches and inside heights of 110½ inches. B & L Motor Freight, Inc. stations equipment at shippers' facilities and makes scheduled deliveries. It serves Continental at its cap plant in Chicago, Ill. and at its plants in Milwaukee, Wis., Van Wert and Mount Vernon, Ohio.



It has solicited the shipper for other traffic at its Chicago, Ill. Melvindale, Mich. and Cleveland, Ohio plants. Protestant is concerned that in time applicant will convert to being a common carrier and jeopardize its existing accounts. Its gross revenues in 1971 were approximately $16,700,000.

Miller Trucking, Inc., of Gas City, Ind. is a motor common carrier authorized to transport glass containers from specified points in Indiana to points and places in Michigan, Kentucky, Ohio and Missouri. It operates 54 tractors and 135 trailers. It offers to serve Continental should it acquire a plant in the area it is authorized to serve. As with B & L Motor Freight, Inc. it is concerned that applicant will ultimately convert to a common carrier and use any authority granted to serve its shippers.

All-American Transport, Inc., of Sioux Falls, S. Dak. is a motor common carrier of general commodities over regular routes, which extend in North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Kentucky and Ohio. It operates 357 tractors and 445 trailers, none of the latter being of the extra high cubic capacity variety. It presently serves the shipper on traffic most of which originates in Iowa and Nebraska. In the period between July 6 and September 16, 1971 it transported 64 shipments for Continental which weighed 166, 004 pounds. All were less than truckload except for four. The four included containers. It opposes the granting of the application because of possible diversion of traffic. It wishes to continue to transport for the shipper and handle any additional traffic it wishes to tender.

Dieckbrader Express, Inc., of Cincinnati, Ohio, is a motor common carrier over irregular routes specializing in transporting container traffic, which constitutes 70 percent of its shipments. It holds authority to transport metal containers and related articles from Chicago and Rockford, Ill., Cincinnati and Cleveland, Ohio, to points throughout much of the territory sought to be served. It can transport

the foregoing commodities from the plant and warehouse sites of Continental in the Elwood, Ind. commercial zone to specified points in Michigan and to points in Illinois, Kentucky and Ohio. It is authorized to transport paper and paper products from the supporting shipper's plant at North Tonawanda, N. Y., to points in Ohio (except Cleveland), Pennsylvania and West Virginia. Protestant can transport fibre drums from Van Wert, Ohio to points in Kentucky, Michigan, New York, Pennsylvania and a designated portion of Indiana. From Three Rivers, Mich. it holds authority to transport paper containers and paper plates to points in Illinois, Indiana, New York, Ohio, Kentucky and West Virginia, and plastic products to points in the previously named states as well as to points in Missouri, New Jersey, Pennylvania and Wisconsin. Additionally, it is authorized to transport paper, paper products, fibreboard containers, pulpboard and pulpboard products within areas of the territory sought.

Pending republication in the Federal Register and any objection thereto, by decision and order served January 18, 1972, the Commission by Review Board No. 2 granted applicant in No. MC-119531 (Sub-No. 120) authority to transport containers, metal, paper, plastic or composite from the plant and warehouse sites of Continental Can Co., at Cook County, Ill., Detroit, Mich., St. Louis, Mo. and Milwaukee, Wis. to points in Illinois, Iowa, Indiana, Kansas, Kentucky, the Lower Peninsula of Michigan, Minnesota, Missouri, Ohio, Tennessee and Wisconsin.

Dieckbrader Express, Inc. operates 382 tractors and 930 extra high cubic capacity trailers. Four hundred and eighty nine of its trailers are 45 feet in length with 110 inch clearance. Protestant pioneered in the development of extra high cubic capacity trailers. Twenty seven of its trailers are equipped with power rollers. Protestant operates 24 hours a day, seven days a week. It spots equipment and makes scheduled pickups and deliveries.



From Continental's plants in Ohio, Indiana, Missouri, Michigan and New York it transported in November and December 1971 and January 1972, 654 shipments, weighing 24,318,961 pounds for revenues of $94,246. Shipments included metal containers, ends and closures and fibreboard boxes, fibre drums, tubes and covers. Included were seventy four shipments from Elwood, Ind., 7 from Three Rivers, Mich., 26 from Tonawanda and North Tonawanda, N.Y. and 654 from Van Wert, Ohio. In addition it transported during the period tin cans out of Chicago for Continental for which it received revenues of $149,026. November, December and January are not peak period months in protestant's operations. In December 1971 the carrier grossed approximately one million dollars. Protestant is fearful that granting of the application will result in a diversion of traffic and have a serious affect on it.

Dieckbrader Express, Inc., on January 10, 1972 filed a voluntary petition for reorganization under the Bankruptcy Act, with the Federal Court at Cincinnati, Ohio. During the week of February 7, 1972 at Cincinnati, Ohio the carrier faced a work stoppage. On February 21, 1972 at Cleveland, Ohio there was a work stoppage for approximately 4 hours. Protestant has obtained an injunction against unauthorized work stoppages.

Fred Olson Motor Service Company, of Milwaukee, Wis., is a motor common carrier of general commodities over regular and irregular routes extending along southeastern Wisconsin, northeastern Illinois and northwestern Indiana, generally along Lake Michigan. It operates 67 tractors and 191 trailers of which approximately 70 are van trailers. It transports tinplate from various mills to Continental's Milwaukee plant. It offers to provide the shipper with any additional service it seeks and would spot equipment if requested.

Graff Trucking Company, Inc., of Kalamazoo, Mich. is a motor common carrier specializing in service to the

paper industry. It is authorized to transport paper and paper mill products from Three Rivers, Mich. to Louisville, Ky., St. Louis, Mo., Davenport, Iowa, and points in Indiana, Illinois and Ohio. Protestant holds general commodity authority over regular routes running between Kalamazoo, Mich. and Chicago, Ill. and can serve an area around Kalamazoo and Chicago. The carrier operates 64 tractors and 133 trailers. Ten of the trailers are 45 foot in length and have door openings of 111 inches.

Graff Trucking Company, Inc. served the shipper at Three Rivers, Mich. until 1967. It solicits its traffic regularly and has received no shipments. Protestant spots equipment and operates 24 hours a day and makes timed deliveries. It is not using its equipment to full capacity. Protestant's operating ratio is slightly over 100 percent. The carrier is also concerned about losing traffic moving from its shippers inbound to Continental at its various plants.

Lovelace Truck Service, Inc., of Terre Haute, Ind. is a motor common carrier of general commodities over regular routes which extend between St. Louis, Mo. and Columbus, Ohio. It operates 279 tractors and 551 trailers. Protestant has 43 trailers that are 42 feet in length, have door openings of 113 inches and inside heights that taper from the 113 inches at the rear to 108 inches at the front. It contends the wedge trailers can take the shipper's tall packs and do not always have to have one layer of containers removed to be loaded as the shipper contends. Lovelace Truck Service, Inc. serves the shipper at St. Louis, Mo., Peoria and Dansville, Ill. in the transportation of containers, can ends, fibreboard drums and tin plate. In August and September 1971 it transported 14 shipments weighing 432,181 pounds for revenues of $3,267. In the period January 3, 1972 through February 15, 1972 it transported 27 shipments, weighing 808,699 for revenues of $4,841. Protestant opposes the application because of a fear of diversion of existing traffic and it wishes to perform additional transportation for the shipper. Its gross revenues in 1971 were $14,100,000.



O. K. Motor Service, Inc., of Chicago, Ill., is a motor common carrier of general commodities over regular routes in northeastern Illinois and southeastern Wisconsin. It operates 32 tractors and 151 trailers. Protestant is reported to have served Continental for 25 years. It opposes the application because of a possible diversion of traffic. The transportation performed for Continental was not described.

McBrides Express, Inc., of Mattoon, Ill., is a motor common carrier of general commodities over regular routes extending between St. Louis, Mo. and central Illinois. It operates 27 tractors and 95 trailers. It transports approximately 5 shipments a month from the supporting shippers St. Louis, Mo. plant to Decateur, Ill. In August 1971 there were 61 shipments for which protestant received revenues of $701. It considers the shipper's traffic attractive and went to perform additional transportation for it.

## DISCUSSION AND CONCLUSIONS

The initial matter to be determined is whether the proposed operation is that of a motor contract carrier as defined in section 203(a)(15) of the Interstate Commerce Act. Section 203(a)(15) defines a contract carrier by motor vehicle, as is pertinent, as any person that engages in transportation by motor vehicle of property, in interstate or foreign commerce, for compensation, under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer. It can be concluded from the evidence that the proposed operation falls within the first alternative definition of contract carriage. Although

applicant was only allocating motor vehicle equipment to its shippers as of the time of hearing, its stated intention for the proposed operation is to assign motor vehicles to the exclusive use of Continental. There is no reason to question its willingness or ability to conduct an operation through the assignment of motor vehicles to the exclusive use of a shipper. As to whether Fast has adequately established what quantities of equipment would be required to perform the service and its capability to make all of the equipment available will be commented on at another point. Having determined that the first alternative definition of contract carriage will be met there is no need to decide whether the alternative definition has also been satisfied.

In deciding that applicant's proposed operation would constitute contract carriage, it must be determined whether the issuance of a permit would be consistent with the public interest and the national transportation policy. In making the determination, section 209(b) of the act requires that, among others, the following factors be considered: (1) the number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority upon the service of protesting carriers, (4) the effect of a denial on applicant and its supporting shippers, and (5) the changing character of the supporting shipper's requirements.

If the application were granted, Fast would serve three shippers under permanently held authority. It has been held as to this criterion, an applicant's case is stronger or weaker in proportion to the number of supporting shippers. In *Umthum Trucking Co., Ext., Phosphatic Feed Supplements*, 91 M.C.C. 691, it was found that upon the execution of the seventh contract that carrier had reached the maximum number of shippers that it could serve and still be considered a contract carrier. Applicant in serving three shippers would be sufficiently within the bounds of contract carriage.

Turning next to the nature of the service proposed the record is fatally defective as for as establishing the



need for the proposed service. While the record is replete with evidence to establish that Continental is a very large shipper and receiver of the commodities sought to be transported within the territory of application and that the shipper is desirous of using Fasts fleet of extra high cubic capacity equipment in a service dedicated to its wants, there was no probative evidence presented to establish what specific service is needed.

In *Midwestern Express, Inc., Contract Carrier Applic.*, 112 M.C.C. 624, the Commission, Review Board No. 3 set forth the evidence required to establish a need. At page 631 it stated:

> • • • However, merely a pro forma showing is not enough. We believe applicant and a shipper must establish with particularity, the special transportation requirements of the latter's business, and describe in detail just how, where and to what extent the proposed service will be used, to the end of providing a sound basis for the conclusion that shipper has specialized or distinct needs to which applicant's operation is better tailored than the service of protesting carriers.

Herein rather than submitting the specific details as called for above, abstractions were presented as to the benefits that could be derived generally from the use of the extra high-cubic capacity equipment in a wide ranging dedicated fleet. The use of extra high-cubic capacity vans could prove beneficial for transporting certain size loads of certain commodities, but the number of such shipments at each location were not delineated. It was never intended that the Fast service would supplant Continental's use of other carriage at its facilities. While applicant set forth conceptually what was wanted of a contract carrier, it never tied it down specifically to Continental's service requirements at the more than 80 plants and additional facilities it operates in the 23 State area for which authority is sought. Fast's proposed role at the individual locations was not spelled out. There were no details

as to just how, where and to what extent the proposed operation would be used. The burden of proof on those seeking the authority is not lessened because the application involves numerous facilities in a major portion of the United States. They must establish the essential elements of a need for service in all of the territory where authority is sought.

The fact that Continental is willing to tender to applicant a specified minimum number of shipments annually does not establish what the shippers need for service is, as the number of shipments offered were in no way related to transportation needs at specific locations. In effect applicant and the shipper are seeking the issuance of a permit, after which they will then determine where and when there is a need for service and the extent to which it will be employed. This is contrary to the regulatory scheme.

In the absence of establishing what the shipper's actual need for service is, there is no way of determining whether the proposed operation is better tailored to meet the shipper's requirements than is offered by protestants. There are protestants that render extensive service to the shipper individually and collectively. Much of the service provided has been without service complaint. Some furnish extra high-cubic capacity equipment. Until such time as the shipper's needs are fully known there is no way of comparing the services as to meeting the shipper's requirements.

There is also a lack of probative evidence for determining what would be required operationally for putting the proposal into effect and the feasibility of Fast performing the service. No way was provided for relating the request for service and the amount of equipment necessary to perform it. Fast offers to start with 40 tractors and 40 trailers. How the figure was arrived at was not explained. Whether it would be adequate or not is unknown. The record was equally as vague when it came to establishing what equipment Fast could provide. No



comprehensive picture was provided of its utilization of its equipment. Considering the relationship between applicant's current assets and current liabilities it had not been shown to be in a financial position to make any significant acquisition of motor vehicle equipment for the operation. In the absence of establishing the essential nature of the operation proposed by probative evidence, applicant's case must fail.

Continuing to treat with the criteria contained in section 209(b), granting of the permit could materially adversely affect the service of Dieckbrader Express, Inc. It receives hundreds of thousands of dollars annually in revenues from Continental. A loss of revenues could throw protestant into financial straits. This year it filed a voluntary petition for reorganization under the Bankruptcy Act. While there has been some complaint as to protestant's service, considering how extensive it is, the complaints have not been established to be of material significance.

Depending upon the extent applicant would be used should a permit be granted, other protestants could also be adversely affected. They receive hundreds of thousands of dollars annually from Continental. Major carrier resources are committed to serving the shipper. A diversion of traffic could disrupt existing traffic patterns. Such potential exists where a new carrier would be authorized to serve the nation's largest producer of packaging in a 23 State area.

Denial of the application would not materially adversely affect Fast. The temporary authority it holds for serving Continental is limited. It was not shown to have made any major commitments in order to render service to Continental under temporary authority. As to Continental, denial of the application will result in the continued performance of its transportation by common and private carriage. No significant change in the quality and quantity of service is foreseen. The *status quo* will basically be preserved.

The character of the shipper's requirements were not so marked by change as to make the criterion a significant factor. The changes were not shown to be so numerous, so major or to occur with such frequency so as to make it an overriding matter.

Considering all the foregoing, it has not been established that the proposed operation will be consistent with the public interest and the national transportation policy and should therefore be denied.

## FINDINGS AND ORDER

Upon consideration of all evidence of record, the Hearing Examiner finds that the granting of the authority sought by applicant would not be consistent with the public interest and the national transportation policy and should therefore be denied.

The Hearing Examiner further finds that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is the Order of the Hearing Examiner that the application be denied.

Dated at Washington, D. C. this 7th day of June, 1972

By the Commission, Morton B. Margulies, Hearing Examiner.

Robert L. Oswald
Secretary

(Seal)



## APPENDIX 1

### EASTERN REGION PLANTS

#### Metal Container Plants

Baltimore, Maryland
Hurlock, Maryland
Silver Spring, Maryland
Malden, Massachusetts
Passaic, New Jersey
Paterson, New Jersey
Pennsauken, New Jersey
Vineland, New Jersey
Albany, New York
Alton, New York
Le Roy, New York
Maspeth, New York
Menands, New York
Cleveland, Ohio
Allentown, Pennsylvania*
Milton, Pennsylvania
Pittsburgh, Pennsylvania
Pittston, Pennsylvania
Conga, West Virginia*

#### Plastic Container Plants

Baltimore, Maryland
Milltown, New Jersey
New Market, New Jersey

#### Fibre Drum Plants

Windsor Locks, Connecticut
Carteret, New Jersey
Tonawanda, New York
Culloden, West Virginia

#### Corrugated Box Plants

Portland, Connecticut
Baltimore, Maryland
Boston, Massachusetts
Holyoke, Massachusetts
Teterboro, New Jersey
Buffalo, New York
Syracuse, New York
Philadelphia, Pennsylvania
Clarksburg, West Virginia

#### Flexible Packaging

Paoli, Pennsylvania

#### Caps

Pittsburg, Pennsylvania
Wilmington, Delaware
Wheeling, West Virgina
Hazelton, Pennsylvania

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* To be opened in 1972

Glass

Clarksburg, West Virginia

Miscellaneous

Patterson, New Jersey—Lithograph Plates
Pittsburgh, Pennsylvania—Tin Plate
Baltimore, Maryland—Machinery
Weirton, West Virginia—Tin Plate

## APPENDIX 2

## CENTRAL REGION PLANTS

### Metal Container Plants

Denver, Colorado
Alsip, Illinois
Chicago, Illinois
Danville, Illinois
Peoria, Illinois
Peoria Hts., Illinois
Elwood, Indiana
St. Joseph, Michigan
Mankato, Minnesota
St. Paul, Minnesota
St. Joseph, Missouri
St. Louis, Missouri
Omaha, Nebraska
Cincinnati, Ohio
Columbus, Ohio
Worthington, Ohio
La Crosse, Wisconsin
Milwaukee, Wisconsin
Racine, Wisconsin

### Plastic Container Plants

Cincinnati, Ohio
Cleveland, Ohio
Lenaxa, Kansas*
Elk Grove Village, Illinois
Burlington, Wisconsin*

### Corrugated Box Plants

Chicago, Illinois
Melvindale, Michigan
Cleveland, Ohio
Columbus, Ohio

### Flexible Packaging Plants

Mt. Vernon, Ohio
Newark, Ohio

* To be opened in 1972



### Cap Plants

Chicago, Illinois
Milwaukee, Wisconsin

### Paper Cup Plants

Chicago, Illinois
Three Rivers, Michigan

### Plastic Cups Plant

Chicago, Illinois

### Fibre Drum Plants

Midland, Michigan
St. Louis, Missouri
Van Wert, Ohio

Miscellaneous

Chicago, Illinois—Machinery, Lithograph Plates, Tin Plate
Dayton, Ohio—Machinery
Burns Harbor, Indiana—Tin Plate
Portage, Indiana—Lithograph Plate and Can ends.*

## APPENDIX B

DECISION AND ORDER

At a Session of the Interstate Commerce Commission, Review Board Number 2, held at its office in Washington, D. C., on the 10th day of November, 1972.

No. MC-126276 (Sub-No. 46)

FAST MOTOR SERVICE, INC., EXTENSION—
23 STATES
(Hodgkins, Ill.)

Upon consideration of the application and the record in the above-entitled proceeding, including the report and recommended order of the Administrative Law Judge, the exceptions filed by applicant, and the replies thereto filed jointly by National Freight, Inc., and Hall's Motor Transit Company; All-American Transport, Inc., CW Transport, Inc., and Midwest Emery Freight System, Inc.; Associated Truck Lines, Inc., Jones Transfer Company, Key Line Freight, Inc.; Dieckbrader Express, Inc., and Schneider Transport, Inc.; Krevda Bros. Express, Inc., Miller Trucking, Inc., and Lee Motor Lines, Inc.; and separately by Graff Trucking Company, Inc., St. Johnsbury Trucking Company, and Hi-Way Dispatch, Inc., protestants; and

*It appearing*, That the Administrative Law Judge recommended that the application be denied;

*And it further appearing*, That the pleadings present no new or material matters of fact or law not adequaterly considered and properly disposed of the Administrative Law Judge in his report, and are not of such nature as to require the issuance of a report discussing the evidence in the light of the pleadings;



Wherefore, and good cause appearing therefor:

*We find*, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge; that the statement of facts, the conclusions, and the findings of the Administrative Law Judge in his report, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

*It is ordered*, That said application be, and it is hereby, denied.

By the Commission, Review Board Number 2, Members Mills, Boyle, and Parker.

Robert L. Oswald,
Secretary

(Seal)

## APPENDIX C

ORDER

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 26th day of March, 1973.

No. MC-126276 (Sub-No. 46)

FAST MOTOR SERVICE, INC., EXTENSION—
23 STATES
(Hodgkins, Ill.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed December 20, 1972, for reconsideration;

(2) Joint Reply by National Freight, Inc., and Hall's Motor Transit Company, protestants, filed January 2, 1973, to (1) above;

(3) Joint Reply by Associated Truck Lines, Inc., Jones Transfer Company, and Keyline Freight, Inc., protestants, filed January 8, 1973, to (1) above;

(4) Petition of applicant, filed January 8, 1973, for further hearing embracing a verified statement of the supporting shipper;

(5) Joint Reply by Lee Motor Lines, Inc., Miller Trucking, Inc., and Krevda Bros. Express, Inc., protestants, filed January 10, 1973, to (1) above;

(6) Motion by the protestants named in (5) above, filed January 10, 1973, to strike (1) above;

(7) Reply by Schneider Transport, Inc., protestant filed January 10, 1973, to (1) above;



(8) Joint Reply by All American Transport, Inc., CW Transport, Inc., and Midwest Emery Freight System, Inc., protestants, filed January 11, 1973, to (1) above;

(9) Reply by Hi-Way Dispatch, Inc., protestant, filed January 11, 1973, to (1) above;

(10) Reply by St. Johnsbury Trucking Company, Inc., protestant, filed January 12, 1973, to (1) above;

(11) Reply by Graff Trucking Company, Inc., protestant, filed January 15, 1973, to (1) above;

(12) Reply by applicant, filed January 15, 1973, to (6) above;

(13) Reply by Graff Trucking Company, protestant, filed January 16, 1973, to (4) above;

(14) Joint reply by National Freight, Inc., and Hall's Motor Transit Company, protestants, filed January 17, 1973, to (4) above;

(15) Reply by St. Johnsbury Trucking Company, protestant, filed January 19, 1973, to (4) above;

(16) Joint reply by protestants in (8) above, filed January 24, 1973, to (4) above;

(17) Reply by Dieckbrader Express, Inc. (Sun Express, Inc.) protestant, filed January 24, 1973, to (4) above;

(18) Reply by Schneider Transport, Inc., filed January 26, 1973, to (4) above;

(19) Joint reply by protestants in (3) above, filed January 29, 1973, to (4) above;

and good cause appearing therefor:

*It is ordered,* That the motion in (6) above be, and it is hereby, overruled.

*It is further ordered,* That the petitions in (1) and (4) above be, and they are hereby, denied, for the reason that the findings of Review Board Number 2, are in accordance with the evidence and the applicable law, and that no

sufficient or proper cause appears for reopening the proceeding for further consideration or for further hearing.

By the Commission, Division 1, Acting as an Appellate Division.

Robert L. Oswald,
Secretary.

(Seal)



## APPENDIX D

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judges
Honorable Cummings, C.J., McMillen J. and Will, J.

Cause No. 73 C 1182 and 73 C 3022 Date: March 25, 1975

Title of Cause
Fast Motor Service, Inc., vs U.S.A. and I.C.C.

Enter decision and order that judgment is entered on both complaints in favor of the defendants, affirming the decisions of the Interstate Commerce Commission. (Draft) Enter dissenting opinion. (Draft)

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

| | |
|---|---|
| Fast Motor Service, Inc., Plaintiff, v. United States of America, Defendant, and Interstate Commerce Commission, Intervening Defendant. | Related Cases No. 73 C 1182 & 73 C 3022 |

DECISION

These two cases came on to be heard by a three-judge court pursuant to 28 U.S.C. §2325. Plaintiff seeks to set aside two decisions of the Interstate Commerce Commission which denied its petitions to be certified as a

contract motor carrier for Continental Can Company Inc. The petitions seek certificates in two different areas of the country. Both are opposed by many truck lines which serve Continental Can Company, both on a contract and a common carrier basis. We have considered each appeal and have concluded that I.C.C.'s decisions should be affirmed.

The first appeal (No. 73 C 1182) involves a petition to serve Continental with trailers of extra high cubic capacity in 23 central and eastern states of the United States. These trailers can carry certain of plaintiff's low density products more efficiently than ordinary size trailers. A hearing officer denied the plaintiff's petition, concluding that it was inconsistent with the public interest and with national transportation policy, applying §209(b) of the Interstate Commerce Act. Review Board No. 2 of the I.C.C. affirmed this decision, and Division 1 of the I.C.C., acting as an Appellate Division, affirmed. This appeal followed, and many of the original twenty-two protestants have intervened to oppose any modification of the I.C.C.'s decision.

The decision is based on a finding that the plaintiff's petition to serve as a contract motor carrier for Continental Can does not satisfy the criteria for certification as established by Congress in §209(b) of the Interstate Commerce Act. Our sole function is to determine whether this decision is supported by substantial evidence. *Illinois Central Railroad Co.* v. *Norfolk & Western Railway Co.*, 385 U.S. 57 (1966).

Section 209(b) reads in pertinent part as follows (49 U.S.C. §309(b) ):

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] the effect which granting the



> permit would have upon the services of the protesting carriers and [4] the effect which denying the permit would have upon the applicant and/or its shipper and [5] the changing character of that shipper's requirements.

Each of the five criteria mentioned in the foregoing section have traditionally been considered and weighed by the I.C.C. in evaluating a petition by a potential contract carrier. We will now examine the I.C.C.'s decision which applied these criteria.

1. *Number of shippers to be served by the applicant.* The hearing examiner found that the plaintiff would be serving only three shippers as a contract carrier under permanent authority if this application were to be granted. This is well below the number normally considered the dividing point when a contract carrier must be carefully scrutinized to determine whether it should become a common carrier. *Umthun Trucking Co. Extension—Phosphatic Feed Supplements*, 91 M.C.C. 691, 697 (1962). Plaintiff argues that its "strong" satisfaction of this criterion should be given great weight, even to the point of overcoming its failure to satisfy some of the other criteria.

This criterion is not quite so well satisfied as the plaintiff contends, however. The hearing examiner on the other application now on appeal (Case No. 73 C 3022, *infra*) found that plaintiff was serving four shippers as a contract carrier under permanent authority, three under temporary authority, and has an application pending for still another permit. The I.C.C. decision in the second case (which we will quote at page 10 *infra*) correctly found that plaintiff had made a "weak" rathet han a "strong" showing under the first criterion, according to the *Umthun* yardstick. The I.C.C.'s conclusion in the second case, No. 73 C 3022, is the correct one, in our opinion.

Furthermore, we disagree with plaintiff's argument for giving overpowering weight to this first criterion. The Commission did not do so but instead gave controlling

weight to the second criterion which, as will appear from our discussion of that criterion hereinafter, is clearly proper.

Finally, it is for the Commission to determine the weight to be given each criterion, and it is not our function to attempt to re-weigh the criteria on this review. See *Merchants Warehouse Company* v. *United States*, 283 U.S. 501, 508 (1931). Even if we should make the attempt, we fail to see how the satisfaction of this criterion could be found to overcome plaintiff's failure to satisfy other criteria.

2. *Nature of the service performed.* Although plaintiff can perform a specialized service by supplying up to 160 outsized trailers for use by Continental, several of the protestants have more such equipment available for that shipper than does the plaintiff. Therefore the burden was on plaintiff to show that it is better equipped to meet the particular needs of the shipper than are the protestants. *I.C.C.* v. *J-T Transport Co., Inc.*, 368 U.S. 81, 90 (1961).

On this criterion of §209(b), the hearing examiner found the petition "fatally defective". The I.C.C. requires an applicant to establish with particularity

> . . . the special transportation requirements of the [shipper's] business, and describe in detail just how, where, and to what extent the proposed service will be used, to the end of providing a sound basis for the conclusion that shipper has specialized or distinct needs, to which applicant's operation is better tailored than the service of protesting carriers. [*Midwestern Express, Inc., Contract Carrier Application*, 112 M.C.C. 624, 631 (1970)]

Plaintiff did not submit evidence of the specific locations which it proposed to serve or the number of loads anticipated at any of the 80 locations maintained by Continental in 23 states. The hearing examiner concluded at p. 22 of his decision:



> . . . In effect applicant and the shipper are seeking the issuance of a permit, after which they will then determine where and when there is a need for service and the extent to which it will be employed. This is contrary to the regulatory scheme.
>
> In the absence of establishing what the shipper's actual need for service is, there is no way of determining whether the proposed operation is better tailored to meet the shipper's requirements than is offered by protestants.

Stated another way, the evidence showed that the plaintiff was not only under-equipped to meet the shipper's specialized needs but was also under-financed. Plaintiff merely had an expectancy of being able to meet the shipper's needs when they became defined and relied on Continental's verbal assurance of future patronage to enable it to finance the necessary acquisition of equipment.

Several of the protestants were better equipped and stronger financially than plaintiff. The evidence supports the trial examiner's conclusion that protestants could fill Continental's other specialized needs, such as supplying roller bed equipment, serving on a 24-hour basis seven days a week, providing multiple delivery and peddle service, and handling less than truckload shipments. To award a certificate as a contract carrier to plaintiff under these circumstances is not, in our opinion, "consistent with the public interest and the national transportation policy" as required by §209(b).

3. *The effect which granting the permit would have on the protesting carriers.* Plaintiff's failure to prove its specialized services with particularity makes it difficult to apply this third criterion. The record shows, however, that the protestants derive substantial revenues from serving Continental and have purchased many extra high cubic capacity trailers for this purpose. To the extent that plaintiff dedicates its equipment even partially to Continental's need (and it proposes to dedicate only 40 trailers) the effect on the protesting carriers' business

with Continental will be adverse, as found by the trial examiner.

This particular criterion was not given great weight by the trial examiner. Since the second one, in our opinion, was properly given controlling weight, we need not attempt to re-evaluate the Commission's determination in this respect. See *Merchants Warehouse Co.* v. *United States, supra* p. 4.

4. *The effect which denying the petition would have on the applicant and/or its shipper.* The trial examiner found this effect to be insignificant. The evidence supports his finding that plaintiff did not show any major commitment to serving Continental under a temporary permit, and Continental could continue to satisfy its needs by using common and contract carriers in addition to plaintiff. In other words, both the applicant and the shipper will be substantially unaffected by a denial of the application.

5. *The changing character of the shipper's requirements.* In this respect, again, plaintiff failed to support its petition with substantial evidence. The record shows that Continental's business has grown substantially in recent years and that certain technological changes have been made in the nature of its products, but it does not show that this justifies a contract carrier status for plaintiff. The Commission need not make detailed findings of fact on this or any other specific conclusion, so long as the conclusion is supported by substantial evidence. *Alabama Great Southern Railroad Co.* v. *United States*, 340 U.S. 216, 227-8 (1951).

Besides contending that it fulfilled all five criteria of §209(b), plaintiff also contends (in Case No. 73 C 1182) that the Commission should have reopened the hearings to consider what effect the bankruptcy of Dieckbrader Express Inc., a competing protestant, would have on these criteria. At the time of the trial examiner's report, Dieckbrader had filed a voluntary petition for reorganization, and he found that to grant the plaintiff's petition would materially affect this protestant's business. The record



does not show exactly what became of Dieckbrader's services, but apparently another protestant took over its certificates, and its equipment was sold at auction. Although Dieckbrader's interests were given weight in arriving at the original decision, its bankruptcy and the assumption of its business by other carriers would not change the facts materially on any criterion except #3 (supra p. 7). Since this one was not a controlling consideration in the Commission's decision, the refusal to reopen the hearings on this question was not an abuse of discretion. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946).

The second case, No. 73 C 3022, involves the same applicant and shipper in 37 states of the south, central and eastern areas. The hearing examiner based his decision on a finding that plaintiff did not qualify as a contract carrier under the definition of §203(a)(15) of the Act. This section provides (49 U.S.C. §303(a)(15) ):

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . . under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Division 1 of the I.C.C. acting as an Appellate Division reversed the hearing examiner's conclusion, since plaintiff's proposal did contemplate the assignment of motor vehicles to the exclusive use of the person served. The Division concluded that the application should nevertheless be denied because the criteria of §209(b) (supra p. 3) were not adequately satisfied. The grounds were substantially the same as in Case No. 73 C 1182 and were stated specifically by Division 1 as follows:

*It further appearing,* That viewed in the light of the criteria of section 209(b) of the Act, the evidence shows (a) that applicant has made a weak showing under the first criterion in that it currently serves nine shippers (including the supporting shipper), under permanent contract authority, (b) that the nature of the proposed service involves the availability of extra high-cube van trailers, multiple deliveries, spotting of equipment, truckload and less-than-truckload shipments, and 24 hours a day, seven days a week service; that little probative evidence was presented to establish what specific service is needed, and as to just how, where, and to what extent the proposed operation would be used (see *Midwestern Express, Inc., Contract Carrier Applic.,* 122 M.C.C. 624); and that applicant has not shown that its proposal is better tailored to meet the shipper's requirements than that offered by protestants; (c) that the effect which a grant would have on protesting carriers would clearly be diversion of traffic presently handled; that 9 of the 14 protestants in this proceeding are providing service for the shipper, generally without service complaint; and that a grant herein would adversely affect their existing operations; (d) that a denial of this application would not adversely affect applicant and we discern little, if any, adverse effect on the supporting shipper because of the large number of common carriers available to it and the existence of its large private carriage operations; (5) that the changing character of the shipper's requirements does not appear to be a significant factor; and that weighing the criteria of section 209(b) in the balance, we conclude that the application should be denied.

As we have already pointed out, the Commission is not required to make detailed findings of fact in this kind of a proceeding. *Alabama Great Southern Railroad Co.* v. *United States,* supra, p. 8. It merely has the duty to make the "basic" or "quasi-jurisdictional" findings necessary to satisfy §209(b), as it did here. If its decision is supported



by substantial evidence, it is not the function of this court to re-weigh the criteria. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607 at 619-21 (1966).

The Commission's findings and conclusions are supported by substantial evidence in the record of Case No. 73 C 3022. The hearing examiner had discussed most of the §209(b) criteria, although reaching his decision on the basis of §203(a)(15). The first criterion, involving the number of shippers to be served, involves primarily the application of the *Umthun* yardstick, supra, p. 3, that offering service to more than six or eight shippers "will be scrutinized with great care" with a view toward converting the applicant into a common carrier (91 M.C.C. at p. 697). We have found that plaintiff made a weak rather than a strong showing on this criterion (supra, p. 4).

Further, the hearing examiner found that nine of the 14 protestants now serve the shipper and that a grant to the applicant would likely result in some diversion. He also found that denial of the application would not adversely affect the applicant or the shipper because the applicant already had more than enough traffic to occupy all of its existing equipment and that the dedication of the proposed 40 units to the shipper was *de minimis* in view of the vast operations of Continental Can. The plaintiff's failure to satisfy the other criteria listed in §209(b) is either self-evident or similar to the facts found in Case No. 73 C 1182.

It Is Therefore Ordered, Adjudged and Decreed that judgment is entered on both complaints in favor of the defendants, affirming the decisions of the Interstate Commerce Commission.

Enter:

/s/ Walter J. Cummings
Circuit Judge

/s/ Thomas R. McMillen
District Judge

Dated: March 25, 1975

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

| | | |
|---|---|---|
| Fast Motor Service, Inc., Plaintiff, v. United States of America, Defendant. | } | 73 C 1182 and 73 C 3022 |

Before CUMMINGS, Circuit Judge, MCMILLEN, District Judge and WILL, District Judge.

OPINION

WILL, J., dissenting. This is an appeal from orders of the Interstate Commerce Commission (Commission) denying plaintiff, Fast Motor Service, Inc. (Fast) applications for permits to conduct specified and specialized motor carrier operations for Continental Can Co., Inc. (Continental) as a contract carrier. The applications related to two different areas of the country. The initial petition involved serving Continental with trailers of extra high cubic capacity in 23 central and eastern states.

The petition for a permit was first filed July 22, 1971. Hearings were held by a Commission (Hearing Examiner) (now Administrative Law Judge) on three days in October 1971 and one day in February 1972. On July 14, 1972, the Hearing Examiner filed his report and recommended denial of the application. The Commission, by its Review Board No. 2, affirmed and adopted the Hearing Examiner's findings of fact, conclusions and decision on November 7, 1972. Plaintiff filed a petition for reconsideration and a further hearing which was denied March 26, 1973. Thereafter, Fast filed the instant action. In the interim, it has been serving Continental under temporary authority.

During the course of the proceedings before the Commission, some 25 carriers originally opposed the petition.



Four of them withdrew their protests and objections. Six others presented no evidence before the Commission and, pursuant to Rule 240(c)(6) of the Commission's Rules of Practice, are deemed no longer to be parties to the proceeding. Fifteen opposed plaintiff's petition for a rehearing. The petition was supported by Continental, the shipper with whom Fast contemplates entering into a contract if authorized to perform the services.

Fast's application relates to performing specialized contract-carrier services for Continental, with 40 tractors and 40 trailers initially being dedicated to the contract. The trailers will be extra high cubic capacity trailers with roller beds wherever required. The Fast personnel will be experienced in handling containers and will be trained, allocated and retained so far as possible to service Continental under the contract.

In supporting the application, Continental established that it is the largest producer of packaging in the United States. It manufactures and distributes all types of containers, bottle caps and other closures using metal, paper, glass, plastic and other materials at 80 plants in the Eastern and Central Regions of the United States alone. In addition, it has 120 warehouses. Continental testified to a need for more of the specialized equipment and services proposed to be furnished by Fast and cited examples of lost business because its other contract carriers could not provide such equipment and common carriers were not available regularly to provide it. The fact that Fast's service would be available 24 hours a day, seven days a week under the contract is important to Continental.

Continental further testified that the protesting carriers either did not have the required special trailers and refused to acquire them or that they were available only to a limited extent. It stated that approval of Fast's application would not have an adverse effect on other carriers serving it, since much of the traffic to be tendered to Fast would be diverted from Continental's private carriage operations which have been steadily increasing. Under

normal circumstances, Continental does not contemplate using Fast as the principal carrier at any plant unless carriers now authorized are unable or unwilling to provide the service.

In this regard, Continental stated that, if Fast's application is ultimately denied, it would be necessary to add more specialized equipment to its private fleet to handle the approximately 2,000 truckloads which it contemplates tendering to Fast. Continental's present private fleet exceeds 700 equipment units, many of which are leased. It would prefer to utilize contract carriers such as Fast, but has found it necessary to expand its private fleet because adequate service by common or other contract carriers is not available even though it now utilizes the services of several hundred motor carriers, including the protestants.

Stripped of legal formalisms and I.C.C. "gobbledy-gook", the case boils down to whether Fast shall be permitted to provide Continental with some of the specialized carrier services it needs and cannot now secure or whether Continental will be required to expand its private fleet which it prefers not to do. In this regard, it should be noted that the I.C.C. would have full regulatory authority over Fast as it does over all authorized contract carriers. If Fast is denied the desired authority, more equipment will be added to the unregulated Continental private fleet. Also involved is the question of whether Fast, a modest company, may endeavor to grow, or Continental, one of our corporate giants, will become larger and more integrated.

Notwithstanding all of the foregoing, the Hearing Examiner found that the record was fatally defective in failing to establish a "need for the proposed service."

Our review is limited to determining whether the Commission's orders denying Fast's application for contract carrier authority are rational and based on proper findings supported by substantial evidence. A reading of the opinion of the Hearing Examiner-Administrative Law



Judge and his findings with respect to the five criteria which, pursuant to 43 U.S.C. §§309(a) and (b), the Commission applies in these cases, an opinion and findings which the Commission adopted leads me to conclude that they are neither rational nor supported by substantial evidence.

In this connection, it should be noted that the first determination to be made in the case of an application for contract carrier authority is whether the operation proposed by the applicant is that of a contract as opposed to a common carrier, 49 U.S.C. §303(a)(15). The Examiner here determined that the contract application was appropriate since the proposed operation was properly that of a contract carrier.

He then proceeded to consider the application in the light of the five criteria specified in §209(a) of the Interstate Commerce Act as amended (43 U.S.C §309(a) ). These are:

1. The number of shippers to be served.
2. The nature of the service proposed and the shipper's needs.
3. The effect which granting the permit would have upon the service of the protesting carriers.
4. The effect which denying the permit would have upon the applicant and/or its shipper.
5. The changing character of the proposed contract shipper's requirements.

I. *The number of shippers to be served.*

With respect to the first criterion, the number of shippers to be served, the brief of the government and the Commission (p. 11) concedes, "The fact is that the Commission here found that Fast had satisfied the first criterion. . . ."

II. *The nature of the service proposed and the shipper's needs.*

The second criterion, the nature of the service proposed, is the criterion which the Commission, the government and Commission brief, and the majority all treat as the crux of the case. All conclude that, in the words of the Examiner "there was no probative evidence to establish what special service is needed." In particular, the Examiner held that the failure to prove a "need for any particular number of pieces of equipment at any location at a particular time" was a fatal defect. I find nothing in the Act or the decided cases which imposes such a requirement and, as the record in this case in my opinion amply demonstrates, such a rigid standard would preclude shippers and contract carriers from obtaining and performing vital services and impose an inflexibility on the nation's truck transportation system which will not be in the public interest.

The Supreme Court in *Interstate Commerce Commission* v. *J. T. Transport Co.*, 368 U.S. 81 (1961), described the procedure in a contract carrier application case as follows (p. 90):

> The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet that specialized need. If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.
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> • • •
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> Moreover, as we read the Act, as amended in 1957, the standard . . . is whether a shipper has a "distinct need" for a different or a more select or a more specialized service.



The record which assertedly contains no probative evidence to establish what special services Continental needs and Fast intends to provide is voluminous. Without attempting to repeat all of the detailed information supplied by Fast and Continental, the following, in my opinion, demonstrates the contrary.

Continental, the largest packaging manufacturer in the United States, desires to enter into a contract with Fast for carrying its containers and corrugated products in palletized and unitized loads utilizing special extra high cubic capacity trailers. The unit cost of moving its cans, drums and corrugated containers is less when extra high cubic capacity equipment is used and Continental, which sells in trailerload quantities, sells more of its products per trailer. This service is to be provided by Fast initially dedicating 40 tractors and 40 trailers with specially trained personnel to the Continental contract.

The service is to be performed in Continental's Eastern and Central Regions in which it has more than 80 plants and 120 warehouses. Based on past and anticipated sales more than 280,000 truckloads will be shipped annually from these points of origin but utilizing the extra high cubic capacity trailers contemplated by Fast's application only when the equipment is made available by other carriers. Continental would initially allocate a minimum of 2,000 special loads to Fast annually. Because Fast's equipment and personnel would be specifically dedicated to the Continental contract, they would be available 24 hours a day, seven days a week. Continental defined its distinct needs which the proposed contract would provide to include:

1. Availability of extra high cubic vans.
2. Dedication of equipment and personnel.
3. Multiple delivery and peddle service.
4. Round-the-clock service.
5. Spotting of equipment.
6. Miscellaneous service features.

No written contract has been concluded between the parties, pending Commission action, but the basic pattern of the proposed arrangement is clear, subject to inevitable clarification on details. It seems obvious to me that what Continental wants and Fast proposes to provide is specialized service for problem and emergency shipments and those that have highly exacting service requirements. Continental specifically contemplates scheduling the Fast equipment for round robin trips transporting products outbound from its plants and raw materials, equipment and supplies inbound. With a dedicated fleet, Continental expects to expedite its deliveries and cut down on warehousing costs as well as having greater flexibility and concomitant savings on its inbound shipments.

It is obvious that, given the special nature of the need and the services contemplated to satisfy it, no shipper or carrier will ever be able to specify the number of pieces of equipment which will be required at any given location on any given day. Unless the Interstate Commerce Act prohibits contract carriers from performing the kind of emergency, fill-in and special haul services which Continental says it needs and Fast is willing to provide, and neither the statute nor any cited case so holds, a definite need has been demonstrated by the shipper.

Continental representatives further testified that, while it uses as many as 50 carriers at any given plant, it is generally dissatisfied with regular route carriers. With the single exception of National Freight, Inc., a regular and irregular route common carrier, no carrier in the Eastern Region regularly supplies it with extra high cubic capacity vans. In the Central Region, five irregular route carriers have extra high cubic capacity equipment but Continental does not believe they are in a position to render it adequate service because of commodity and territorial limitations in their certificates and the need for their extra high cubic capacity equipment by other shippers. In particular, it was dissatisfied with the service it was receiving from Dieckbrader Express, Inc., its principal extra-



high cubic capacity carrier in the Central Region. Subsequent to the hearings, Dieckbrader went into bankruptcy and ceased operating, although Sun Investment, Inc., at least temporarily, took over the Dieckbrader operating rights and operations.

Finally, Continental's representatives stated that if the Fast authority was not granted, Continental would find it necessary to expand its already substantial private fleet of some 300 tractors and 700 trailers to provide the contemplated Fast services although it would prefer to utilize the latter. I would have assumed that the Commission would likewise prefer to have a regulated carrier perform these services and expand the available public transportation facilities rather than see more unregulated privately owned and operated equipment added to what is already a very large private fleet.

What the Commission is apparently holding here is that, even if a shipper badly needs special equipment carrier services, unless it can be specified how many units will be needed at a given location at a given time, no public carrier will be authorized to fill that need. Where, as here, the need is to have carrier services available to meet a known volume of emergency, special and unpredictable needs, though the exact time, place and individual magnitude of each is obviously impossible to pinpoint in advance, the Commission's requirement of certainty will preclude public contract or common carriers from ever being authorized to furnish such services. That result is not mandated by either the statute, the decided cases or common sense. I do not believe this Court should lend credibility to it.

While the "need" criterion is deemed conclusive by the defendants and the majority, the Hearing Examiner did consider the effect the grant would have on protesting carriers as well as the effect its denial would have on Fast and Continental and the changing character of Continental's shipping requirements.

III. *The effect on protesting carriers*

As to the effect on protesting carriers, he found that, depending upon the extent Fast's facilities would be used if authority were granted, "other protestants could also be adversely affected."

This conclusion of possible adverse effect on other carriers flies in the face of Continental's statements that it did not intend to use Fast as a prime carrier at any location unless existing carriers refused to provide adequate service, that it intended to use Fast to handle traffic resulting from new plant openings, from increased production as a result of production line changes, from new warehouses, and that it intended to use Fast for specialized services. In addition, Continental expected to cut down its use of its own private carrier fleet. Finally, it stated categorically, that it did not intend to divert any traffic from any of the protestants to Fast.

In the *J.T. Transport Co.* case, *supra,* the Supreme Court rejected the Commission's presumption of injury to existing carriers and prescribed a balancing test involving judging the competing interests of the carriers and the shippers "with as much delicacy as the prospective nature of the inquiry permits, . . ." (368 U.S. at 89). It seems obvious to me that, in the light of Continental's testimony as to its needs and its intention not to divert traffic from existing carriers to Fast, the conclusion that protestants "could" be injured cannot be the product of such a balancing process.

IV. *The effect of denial of the permit on Fast and Continental.*

Fast, as the Examiner found, is a motor contract carrier primarily authorized to serve shippers in the container industry. It has authority to operate in virtually all of the territory involved in the instant applications. It is headquartered in Hodgkins, Illinois, and has facilities at Philadelphia, Pa., Cleveland, Ohio, Asheville, N.C., Atlanta,



Ga., Indianapolis, Ind., Louisville, Ky., Minneapolis, Minn., Okmulgee, Okla., St. Louis, Mo., and Chicago, Ill. It owns 22 trucks, 86 tractors and 207 trailers. Approximately half of its trailers are what are considered high cubic capacity and the other are extra high cubic capacity. At the time of the hearing, some 20 tractors and 20 trailers were used to perform transportation services for Continental. As previously indicated, the application contemplates the dedication of 40 tractors and 40 extra high cubic capacity trailers for use by Continental.

From the foregoing, it is apparent that denial of the permit will not put Fast out of business. It will, equally obviously, prevent it from expanding to serve Continental's needs.

Continental, on the other hand, is not going to stop shipping by truck to satisfy the needs of its far flung industrial complex. If other carriers cannot meet its requirements, Continental representatives testified that it will expand its private fleet to do so. The Examiner was quite correct in concluding (Report, p. 13):

> As to Continental, denial of the application will result in the continued performance of its transportation by common and *private* carriage. The status quo will basically be preserved. (underscoring supplied)

The Supreme Court, on the other hand, in the *J.T. Transport Co.* case, *supra,* has made it clear that "the aim of the statute is not to protect or achieve the *status quo,* but to establish a regime under which new contract carriage would be allowed if the distinct needs of shippers indicate that it was desirable." (368 U.S. at 89). Yet the Examiner apparently was satisfied to conclude (Report, p. 13): "The *status quo* will basically be preserved." Again, it seems obvious that the Examiner and the Commission's approach and conclusion are inconsistent with the philosophy which the Supreme Court has enunciated.

V. *The changing character of Continental's requirements.*

The Examiner and the Commission disposed of this criterion by acknowledging generally that there had been and would be changes in Continental's shipping requirements but concluded: "The changes were not shown to be so numerous, so major, or to occur with such frequency as to make it an overriding matter." That conclusion is not only ungrammatical, it is so vague as to make it impossible to determine whether it is rational or supported by substantial evidence. The government and Commission brief concedes the absence of specific findings or the reference to any testimony supporting the conclusion, but asserts that this is unncessary citing *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U.S. 173 (1959) and *United States* v. *Pierce Auto Freight Lines,* 372 U.S. 515 (1946). Neither of these cases authorizes the Commission to make unsupported general conclusions.

CONCLUSION

The fundamental error of the Commission's (Examiner's) conclusions, as I see it, is perfectly demonstrated in the summary of the case (Report, p. 22):

> . . . While applicant set forth conceptually what was wanted of a contract carrier, it never tied it down specifically to Continental's service requirements at the more than 80 plants and additional facilities it operates in the 23 State area for which authority is sought. Fast's proposed role at the individual locations was not spelled out.
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> * * *
>
> The fact that Continental is willing to tender to applicant a specified minimum number of shipments annually does not establish what the shipper's need for service is, as the number of shipments offered were (sic) in no way related to transportation needs at specific locations.



We are back to the proposition that, unless a shipper and contract carrier applicant can identify the number of tractors and trailers which will be needed at a given location on a given day, the Commission will not grant a permit. The inescapable result of this attitude is that no contract carrier can ever be authorized to provide special and emergency services to a shipper even though the latter can predict on the basis of its experience that it has and will have a substantial need for such services on an annual basis and believes, again on the basis of its experience, that its present carriers either cannot or will not meet its needs.

Such an attitude is hardly consistent with the objectives of the Interstate Commerce Act. As the Supreme Court emphasized in *J. T. Transport Co., supra,* the aim of the Interstate Commerce Act is not to preserve the *status quo* but to allow new contract-carrier services to meet shippers' needs. Given the nature of Continental's needs which Fast seeks to meet, it is difficult for me to see how a more specific or detailed case could have been presented. I can only conclude that the Commission and the Supreme Court operate on conflicting philosophies, the former seeking to prohibit new contract-carrier services unless a detailed blue print of exactly what equipment will be needed in the future at a given location on a given date is presented while the Court favors expanding the available contract-carrier services to meet shippers' needs. I find myself in agreement with the latter philosophy and would reverse and remand.

/s/ Hubert L. Will
Hubert L. Will, Judge
United States District Court

Dated: March 25, 1975

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

| | |
|---|---|
| Fast Motor Service, Inc., Plaintiff, v. United States of America, Defendant, and Interstate Commerce Commission, Intervening Defendant. | Civil Action No. 73 C 1182 |

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Fast Motor Service, Inc., the Plaintiff above-named, hereby appeals to the Supreme Court of the United States from the Decision and Order entered in this action on March 25, 1975 in favor of the defendants, affirming the Decision of the Interstate Commerce Commission in *Fast Motor Service, Inc., Extension —23 States,* MC 126276 (Sub No. 46).

This appeal is taken pursuant to 28 U.S.C. 1253.

/s/ James C. Hardman
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Telephone: 236-5944



IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

| | |
|---|---|
| Fast Motor Service, Inc., Plaintiff, v. United States of America, Defendant, and Interstate Commerce Commission, Intervening Defendant. | Civil Action No. 73 C 1182 |

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS )
) SS
COUNTY OF COOK )

The undersigned, being first duly sworn on oath, deposes and says that she served copies of the foregoing Notice of Appeal on the Solicitor General, Department of Justice, Washington, D.C. 20531; the Secretary of the Interstate Commerce Commission, Washington, D.C. 20423 and all parties who had entered appearances in this cause. Service was accomplished on the 14th day of May, 1975 in compliance with Rule 33 of the Supreme Court of the United States.

/s/ Geraldine Gerard
Geraldine Gerard

Subscribed and sworn to before me this 14th day of May, 1975.

/s/ James C. Hardman
James C. Hardman
Notary Public

(Seal)

Supreme Court, U. S.
FILED
JUL 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974.

**No. 74-1477**

FAST MOTOR SERVICE, INC.,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION

and

ALL-AMERICAN, INC.,
CW TRANSPORT, INC.,

*Appellees.*

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

## MOTION TO AFFIRM.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974.

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**No. 74-1477**

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FAST MOTOR SERVICE, INC.,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION

and

ALL-AMERICAN, INC.,
CW TRANSPORT, INC.,

*Appellees.*

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ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

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## MOTION TO AFFIRM.

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Appellees, All-American, Inc. and CW Transport, Inc. move, pursuant to Supreme Court Rule 16, to affirm the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered March 25, 1975, for the reason that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

## QUESTIONS PRESENTED.

It is respectfully submitted that the only questions presented here are:

1. Did the Interstate Commerce Commission properly act within its statutory authority in denying the application of Appellant, which is the subject matter of this appeal?

2. Is the decision of the Interstate Commerce Commission as affirmed by the Court below, supported by substantial evidence of record?

3. Was the action of the Commission in denying Appellant's application arbitrary or capricious?



## STATEMENT OF THE CASE.

Appellant sought authority from the Interstate Commerce Commission as a contract carrier by motor vehicle in the transportation of specified commodities between points in 23 named states under a continuing contract with Continental Can Co., Inc. The application was assigned for hearing before an Administrative Law Judge for issuance of a report and recommended Order thereon. The application was opposed by various motor common carriers, including Appellees herein, and by Order served July 14, 1972, the Administrative Law Judge denied Appellant's application in its entirety upon finding that the authority sought would not be consistent with the public interest and the National Transportation Policy. This recommendation was ultimately affirmed by Division 1 of the Interstate Commerce Commission acting as an Appellate Division by Order served March 26, 1973.

Thereafter Appellant filed its complaint in the United States District Court for the Northern District of Illinois, Eastern Division, seeking judicial review of the administrative agency's decision and on March 25, 1975, that Court entered its decision sustaining the earlier rulings of the Interstate Commerce Commission.

Appellant has filed its Notice of Appeal of that decision with this Honorable Court and because these Appellees feel that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument, this Motion to Affirm is respectfully submitted.

## ARGUMENT.

The Appellant herein is looking to this Honorable Court to substitute its judgment for that of the Commission's even though the decision rendered by the administrative agency has support in the record and the applicable law. Such relief would be contrary to the enunciations of this Honorable Court in *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 536 (1946).

Appellant would have this Honorable Court believe that the decision of the administrative agency and the sustaining of that Order by the Court below erodes the principles set forth by this Honorable Court in the landmark decision of *Interstate Commerce Commission* v. *J-T Transport Company, Inc. et al.*, 368 U. S. 81 (1961), and that instead of relying upon the guidelines set forth by this Court in that decision, the administrative agency imposed upon Appellant herein a burden of proof not required of similar applicants seeking authority from it. The Court below found such argument to be unsupported in the record, and it is respectfully submitted that an affirmation of that decision by the Court below is here warranted.

In the *J-T Transport Company* case, this Honorable Court held in essence that in a contract carrier proceeding the distinct need of shippers for new contract carrier service, as a criterion for the granting or denial of a contract carriage permit, must be weighed against the adequacy of existing service; that there is no presumption that the services of existing carriers will be adversely affected by a loss of potential traffic, if they have not handled it before; that the applicant does not have the burden of proving the inadequacy of existing services; that the adequacy of existing service is judged by whether existing carriers can fill the distinct needs of the shippers and not merely by whether they can provide reasonably adequate service; and that rates are a factor to be weighed in determining the need for new service. That such



guidelines remain the law today concerning contract carriage is so well accepted as to not require further argument, but it must be kept in mind that in fact, the administrative agency rendered its decision consistent with these guidelines in every respect.

Appellant's entire jurisdictional statement rests upon its argument that the administrative agency applied a different standard or burden of proof to this Appellant than it does to other applicants before it. The administrative agency simply found that Appellant's presentation before it was so vague and indefinite so as to preclude the Commission from making a rational determination as to what in fact the transportation needs of Continental Can were, and as a consequence thereof, leaving the Commission unable to make an effective comparison of the services proposed by applicant with that available from existing carriers. As this Honorable Court noted in the *J-T Transport Company, supra*, at page 90, it is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need and when and if that is accomplished, those opposing the application have the burden of going forward to show that they have the ability and willingness to meet that specialized need. If those opposing carry that burden, the burden of proof reverts to the applicant to demonstrate somehow that it is better equipped to meet the distinct needs of the shipper than are those opposing its application.

Appellant would have this Honorable Court believe that it appeared before the administrative agency not knowing the burden of proof it was required to present to establish a prima facie case. This representation is made even though the administrative agency in *John Novak Contract Carrier Application*, 103 M. C. C. 555, 557 (1967), articulated clearly the type of evidence it expected of any applicant seeking authority from it. This includes an identification of the commodities shipped or received, the points to or from which the traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving the traffic and any deficiencies

in existing services. Throughout the proceedings before the administrative agency as well as the Court below, the Appellant herein readily acknowledged that its presentation before the agency was, to say the least, imprecise in nature, but took the position that the Commission in other proceedings had accepted such evidence in support of applications. As a consequence Appellant argued, one standard of proof was applied to this Appellant while another less stringent burden upon other applicants before the administrative agency. Appellant relied heavily in the Court below in this regard on the Commission's decision in *Mobile Home Express Limited, Extension—12 States,* 112 M. C. C. 765 (1971). Appellant noted that the Commission concluded therein at page 770, that an applicant is not required to present evidence of the precise volume of traffic which it would tender to it and that imprecision concerning origins and destinations of the involved traffic will not operate as a total bar to a grant of the authority sought. Appellant failed to apprise itself of the fact that the Commission also determined, however, that such imprecision does affect the weight to be accorded such indefinite evidence when related on balance to that offered by protestants in determining whether a grant of authority is justified. In fact, it was this imprecision in the evidence presented which led the Commission to deny the authority sought in the *Mobile Home* case and such decision was affirmed on appeal in *Mobile Home Express Limited* v. *U. S., et al.,* 354 Fed. Supp. 701 (D. C. Oklahoma, 1973).

The administrative agency and the Court below have determined that viewing the record as a whole, Appellant has failed to sustain its burden of proof in this proceeding; the same burden of proof required of any applicant seeking authority from the Interstate Commerce Commission.



## CONCLUSION.

Appellant here looks to this Honorable Court to substitute its judgment for that of the administrative agency based upon the evidence of record in this proceeding. It suggests that the administrative agency applied one standard of proof to its application requiring evidence of greater substance than that required of other applicants seeking similar authority. The fact remains that the vague and indefinite presentation made by Appellant before the administrative agency effectively precluded it from reaching any decision other than the one which is the subject matter of this appeal. In point of fact, the Appellant is here seeking that very relief; that is, it seeks to advance the position that the broader the authority sought the lesser the burden of proof necessary to justify a grant of authority. As the Administrative Law Judge correctly noted, "the burden of proof on those seeking the authority is not lessened because the application involves numerous facilities in a major portion of the United States. They must establish the essential elements of a need for service in all of the territory where authority is sought." (Jurisdictional Statement, p. 30a).

The questions presented here have long ago been decided by this Honorable Court, and Appellant has raised no issues or facts of any substance sufficient to warrant further argument. Accordingly, it is respectfully urged that this Motion to Affirm be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1477

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

FAST MOTOR SERVICE, INC.,
Appellant,
vs
THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,
Appellees.
and
ASSOCIATED TRUCK LINES, INC., ET AL.,
Intervenors-Appellees.

## MOTION TO AFFIRM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1477

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
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FAST MOTOR SERVICE, INC.,
Appellant,
vs
THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,
Appellees.
and
ASSOCIATED TRUCK LINES, INC., ET AL.,
Intervenors-Appellees.

## MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Associated Truck Lines, Inc., Jones Transfer Company and Key Line Freight, Inc., move that the judgment of the District Court be affirmed.

## STATEMENT OF THE CASE

This is a direct appeal from the final judgment of a statutory three-judge District Court affirming the decision of the Interstate Commerce Commission in its Docket No. MC-126276 (Sub No. 46). The agency proceeding below involved an application by Fast Motor Service, Inc., the appellant herein, for a permit as a contract carrier, by motor vehicle, of containers and other named commodities between points in 23 states, under contract with Continental Can Company, Inc. The appellant and its supporting shipper, Continental Can, presented evidence in support of the application at an oral hearing before a Hearing Examiner, and 22 protesting motor carriers presented evidence in opposition. The Hearing Examiner issued a Report and Order denying the application, and this Report and Order has been sustained on appeal within the Commission and by the District Court.

At hearing, applicant and its supporting shipper sought to demonstrate that the appellant was better equipped to meet the distinct needs of the shipper than were the protestant carriers. The principal argument advanced by the appellant and the shipper was that appellant proposed to serve the shipper with motor vehicle van equipment of greater than normal height and cubic capacity to handle certain of shipper's light and bulky containers. However, although over 80 Continental Can facilities were involved in this application, the shipper did not project either the number of loads to be tendered to appellant at any one of these facilities or the volume of traffic from any facility which required high cubic capacity equipment. According to the shipper, appellant's service was also desired because of appellant's dedication of particular units to the shipper's traffic, appellant's availability to provide a service



at various unnamed locations at seasonal peaks, appellant's willingness to provide multiple pick ups, and appellant's willingness to spot equipment for loading at various plant or warehouse locations.

Twenty-two carriers appeared in opposition to the granting of the sought authority. Many of these carriers were providing service to the shipper at various of its facilities, and many of these carriers operated the high cubic capacity equipment described by the appellant and the shipper.

In reviewing the testimony of the supporting shipper, the Hearing Examiner noted that the extra high cubic capacity equipment requested by the shipper was specifically required only under certain situations. Extra high cubic capacity equipment is of no advantage in the movement of many of the commodities produced by the shipper and even within particular categories of containers, the need for added trailer height varies depending upon the height of the individual container. Moreover, the Examiner found that not all customers order in sufficient quantities nor do all receivers desire sufficient aggregation to utilize maximum capacity of an extra high cubic capacity van. (Jurisdictional Statement, p. 9A, 10A).

Under the terms of Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), 309(b), the Examiner's Report and Order found that appellant's proposed service constituted contract carriage under Section 203(a)(15) and that the appellant would be serving a permissible number of shippers under the first criteria of Section 209(b). However, in evaluating the second Section 209(b) criteria, the nature of the service proposed, the Examiner found that the available evidence overwhelmingly failed to support issuance of a permit to appellant. The Examiner stated that while appellant proposed to provide high cubic capacity to the shipper at un-

stated locations, protestants were rendering extensive service to the shipper at many locations, largely without complaint, and in many instances, were providing high cubic capacity equipment. Also, the Examiner noted that high cubic capacity vans were beneficial to the shipper only for transporting certain size loads of certain commodities but that the number of such shipments requiring high cubic capacity equipment was never delineated for any particular plant location. Under such circumstances, the Examiner found there was no way of determining whether appellant's proposed service was actually better tailored to meet the shipper's requirements than the collective services of the protestants already available at many of the shipper's facilities. (Jurisdictional Statement, p. 29A, 30A)

The Hearing Examiner also found that appellant had failed to establish its financial or operational ability to provide the requested service to the shipper. Under the other criteria of Section 209(b), the Examiner found that denial of the application would not adversely affect either appellant or the shipper but that a grant of the permit and diversion of traffic could adversely affect the traffic patterns of the protestants. The Examiner also found that the changing character of the shipper's requirements did not significantly favor a granting of the permit.

The Commission affirmed and adopted the Hearing Examiner's Report in two succeeding Orders, and this affirmance was sustained by the majority opinion of the District Court. While declining to fully reweigh the criteria considered by the Commission, the Court stated that certain of the protestants were better equipped and stronger financially than appellant and that protestants could fulfill the specialized needs of the supporting shipper, including the furnishing of high cubic capacity equipment.



The Court sustained the Hearing Examiner's conclusion that appellant had failed to demonstrate that it was better equipped to meet the shipper's needs for high cubic capacity equipment than the protestants, by virtue of its failure to adduce evidence as to the extent of such needs at any particular plant location of the shipper. (See Jurisdictional Statement, p. 44A, 45A)

## ARGUMENT

The majority opinion of the District Court below was entirely proper in affirming the action of the Interstate Commerce Commission in this matter. Essentially, these appeal proceedings involve little more than an attempt by appellant to force a reweighing of the evidence considered by the Commission. In this situation, substantial evidence clearly existed to support the findings of the Commission's Hearing Examiner.

The central feature of appellant's application was the shipper's desire for high cubic capacity van equipment and the promise of the appellant to provide such equipment. However, based on the underlying record, the Examiner found that a number of the protestants serving many of the shipper's facilities were also able to provide the services desired by the shipper. Furthermore, the Judge noted that many items produced at many of the shipper's facilities did not, in fact, require high cubic capacity equipment for transportation. Under these circumstances, it clearly was incumbent on the appellant and the shipper to state the projected volumes of traffic requiring high cubic capacity equipment moving from each of the shipper's plants and to state the projected need for appellant's service at such facilities. Without such information, the Examiner had no way of determining whether appellant's proposed service was better suited

quantitively or qualitatively to meet the shipper's needs, when similar services were available from protestants at many of the plants involved in the application below. There is little question that such findings are supported by substantial evidence and were properly affirmed by the District Court. Compare *United States* v *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536; *Mississippi Valley Barge Line Co.* v *United States*, 292 U.S. 283, 286-87 (1934).

There is no merit to appellant's contention that the decisions of the District Court and the Commission below are in any way based on presumptions in favor of protestants or are contrary to principles expressed in *I.C.C.* v *J. T. Transport Co.*, 368 U.S. 81 (1961). After reviewing the appellant's service proposal and finding that protestants had the ability to meet the specialized needs described, the Hearing Examiner and the reviewing Court each properly concluded that appellant had the burden of demonstrating that it was better equipped to meet the shipper's needs than the protestants. Compare *I.C.C.* v *J. T. Transport Co.*, 368 U.S. at 90. Many of the protestants before the Commission, including two of the movants herein, were handling traffic for the shipper at the time of the hearing, and the Hearing Examiner clearly did not engage in any presumption in his limited finding that protestants could be adversely affected by a grant of the permit to appellant. Similarly, there is no merit to the argument that the Commission has improperly ignored the issue of emergency or peak period transportation. Such services were expressly noted by the Hearing Examiner and found to be generally available from the protestant carriers. (Jurisdictional Statement, p. 10A, 45A) Appellant's arguments in these areas all seek a reweighing of various evidentiary factors which were fully considered



by the Commission. The reviewing Court below properly noted that courts should not attempt to reweigh such evidence on review. Compare *Midwest Emery Freight System, Inc.* v *U.S.*, 293 F. Supp. 403 (N.D. Ill., 1968); *Merchants Warehouse Company* v *U.S.*, 283 U.S. 501, 508 (1931).

Contrary to appellant's contention, the Commission has in no way acted arbitrarily or inconsistently in denying the application below. The two earlier Commission cases[1] cited by applicants are readily distinguishable from the instant proceeding in that they involved only one or two shipping origins as opposed to the over 80 plants involved herein and involved specific evidence as to the inability of protestant carriers to provide the desired service at the particular locations. It is in no way inconsistent for the Commission to have granted the applications in the two cited proceedings and to have denied the application involved in this appeal.

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[1] *Umthun Trucking Co., Extension—Seven States*, 112 M.C.C. 860 (1971); *Fleet Transport, Inc., Extension—Orthodichlorobenze*, 112 M.C.C. 732 (1971), aff'd sub nom *Chemical Leaman Tank Lines, Inc.* v *United States*, 324 F. Supp. 104 (D. Del., 1972).

## CONCLUSION

The District Court's decision is clearly correct, and no substantial question is presented by this appeal. Accordingly, the judgment of the District Court should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, John W. Bryant, counsel for Intervenors-Appellees herein and a member of the Bar of the Supreme Court



of the United States, hereby certify that, on the 9th day of July, 1975, I served three copies of the foregoing document upon the parties hereto, postage prepaid, to the following:

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Supreme Court, U. S.
FILED
JUL 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-1477

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FAST MOTOR SERVICE, INC., *Appellant*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

and

NATIONAL FREIGHT, INC., *Appellee*

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**On Appeal from the United States District Court for the Northern District of Illinois Eastern Division**

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## MOTION TO AFFIRM OF NATIONAL FREIGHT, INC.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-1477

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FAST MOTOR SERVICE, INC., *Appellant*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

and

NATIONAL FREIGHT, INC., *Appellee*

---

**On Appeal from the United States District Court for the Northern District of Illinois Eastern Division**

---

## MOTION TO AFFIRM OF NATIONAL FREIGHT, INC.

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Appellee, National Freight, Inc. moves, pursuant to your Honorable Court's Rule 16 to affirm the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered March 25, 1975, on the bases that the questions presented were

properly reviewed by the Court below and are so insubstantial as to not warrant plenary review by your Honorable Court.

## QUESTION PRESENTED

Did the Court below appropriately and correctly analyze the criteria for the issuance of a Permit consistent with Part II of the Interstate Commerce Act, 49 U.S.C., 309(b)?

Appellant in no manner has shown that either the Interstate Commerce Commission or the Court below incorrectly applied the criteria established by the Congress in the above-cited section of the Interstate Commerce Act.

## STATEMENT OF THE CASE

On or about February 16, 1971, Appellant, Fast Motor Service, Inc., filed an application with the Interstate Commerce Commission docketed at MC 126276, Sub-No. 46, wherein it sought *contract carrier* operating authority, over *irregular routes,* in the transportation of:

> *Containers, container ends, closures and accessories, paper and paper articles, and plastic articles and materials, equipment and supplies* used in the manufacture, distribution and sale of the foregoing specified commodities (except commodities in bulk or those which because of size or weight require the use of special equipment), between points in Colorado, Nebraska, Kansas, Minnesota, Iowa, Missouri, Wisconsin, Illinois, Indiana, Ohio, Michigan, West Virginia, Massachusetts, Maryland, Delaware, New Jersey, Pennsylvania, New York, Connecticut, Vermont, New Hampshire, Rhode Island, Maine, and the District of Columbia, under contract with Continental Can Co., Inc.



The matter was duly heard by the Interstate Commerce Commission and National Freight, Inc. and others appeared in opposition, presented evidence and filed Briefs in opposition. Administrative Law Judge Margulies, by Report and Order served July 14, 1972, recommended denial of the application, which action was sustained, after Exceptions by Appellant and Replies by other parties, by Order served November 22, 1972. A subsequent Petition for Reconsideration and an additional Petition for Further Hearing by Appellant, to which Replies were filed, resulted in an Order, served April 5, 1973, denying Appellant's Petitions and sustaining the prior denial of the application.

Appellant then filed its Appeal with the United States District Court for the Northern District of Illinois, Eastern Division, which, by Opinion filed March 25, 1975, sustained the Interstate Commerce Commission.

## ARGUMENT

In Appellant's application before the Interstate Commerce Commission, it proposes a contract carrier service utilizing 40 tractors and 40 extra-high-cube capacity trailers so as to provide service for Continental Can Company between its 82 plants and its customers throughout a 23-State area, plus the District of Columbia (J.S. App. A, 29(a)). The shipper acknowledged that within its eastern region embracing 43 plants (J.S. App. A, 7(a)), it had sufficient extra-high-cube van trailers for movement within the eastern region via Appellee National Freight, Inc., and sufficient service in the transportation of other materials and equipment and supplies (J.S. App. A, 14(a)). There were no details presented as to how, where and to

what extent the operation would be actually used (J.S. App. A, 29(a), 30(a)).

Factual details concerning Appellant and those protesting the case and the evidence of the supporting shipper, were reviewed in detail (J.S. App. A, 4(a)-27(a)).

The Administrative Law Judge then considered the five statutory criteria established by Congress in Section 309(b) of Part II of the Interstate Commerce Act (49 U.S.C. 309(b)), which in pertinent part, reads as follows:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

As to these criteria, the Administrative Law Judge found, and concluded as follows:

1. The number of shippers to be served by Applicant—the Appellant fulfilled the first of these criteria, in that it would serve only three shippers (J.S. App. A, 28(a)).

2. The nature of service proposed—the record here was considered fatally defective (J.S. App. A, 29(a)-31(a)).

3. The effect which granting the permit would have upon the services of protesting carriers—the Administrative Law Judge found that other carriers would be



adversely affected (J.S. App. A, 31(a)), which in the case of Appellee National Freight, Inc., is sustained by his finding of substantial traffic handled within the eastern region and its fear of losing that traffic (J.S. App. A, 16(a)).

4. The effect which denying the permit would have upon the Applicant and/or shipper—it was found that denial would not adversely affect Appellant or its supporting shipper (J.S. App. A, 31(a)).

5. The changing character of the shipper's requirements—it was here found that these requirements were not marked by such change as would make this element a significant factor (J.S. App. A, 32(a)).

The Court below likewise considered each of these criteria, reviewed the conclusions of the Administrative Law Judge with respect thereto and likewise found Appellant's case to be wanting (J.S. App. D, 43(a)-46(a)). A dissenting opinion reached a contrary conclusion and would have modified the Order of the Interstate Commerce Commission by approval of the application.

Appellant should take no comfort from the dissent for it has been held that Orders of the Interstate Commerce Commission should not be set aside or modified by a Court on review even though the Court might reach a different conclusion on the facts presented if the Orders are within the scope of the Commission's statutory authority, are based upon appropriate findings and are supported by substantial evidence. See *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-536; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139; *Virginia Ry. Co.* v. *United States*, 272 U.S. 658, 663-666; *Illinois Central Railroad*

*Co. et al* v. *Norfolk & Western Railway Co. et al,* 385 U.S. 57, 87 S.Ct. 255, 17 L.Ed.2d 162 (1966).

The Court below found that there was substantial evidence to support the decision of the Interstate Commerce Commission and the statutory criteria had been properly met. In such circumstance, there is no substantial federal question for determination. Appellant seeks to have your Honorable Court substitute its conclusion for that of the Interstate Commerce Commission on the basic facts presented, which have twice been construed against it.

## CONCLUSION

The decision of the District Court affirming the action of the Interstate Commerce Commission, is clearly supported by substantial evidence and is correct as a matter of law. It is, therefore, prayed that the Motion to Affirm be granted.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1477

FAST MOTOR SERVICE, INC.,

*Appellant,*

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

*Appellees,*

and

SCHNEIDER TRANSPORT, INC.,

*Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

## MOTION TO AFFIRM OF SCHNEIDER TRANSPORT, INC.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

**No. 74-1477**

FAST MOTOR SERVICE, INC.,

*Appellant,*

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,

*Appellees,*

and

SCHNEIDER TRANSPORT, INC.,

*Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

## MOTION TO AFFIRM OF SCHNEIDER TRANSPORT, INC.

criteria contained in Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b). This decision was affirmed by Review Board No. 2 of the I.C.C. following exceptions by Appellant and replies thereto by other parties. Subsequent Petition for Reconsideration and Petition for Further Hearing were denied by the Commission, Division 1 (acting as an Appellant Division) on March 26, 1973.

Appellant brought action in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin, set aside, and annul the Decision and Order of the Interstate Commerce Commission, denying its application for a permit. The District Court entered judgment on the complaint in favor of defendants, affirming the decision of the Interstate Commerce Commission.



## ARGUMENT

The decision of the District Court is plainly correct. The District Court correctly found that its sole function was to determine whether the decision of the Interstate Commerce Commission is supported by substantial evidence. *Illinois Central Railroad Co.* v. *Norfolk & Western Railway Co.*, 385 U.S. 57, 87 (1956). (J.S. App. D. 42 a). In reaching its judgment in favor of defendants the District Court thoroughly analyzed the evidence of record in light of the criteria for certification as established by Congress in Sec. 209(b) of the Interstate Commerce Act. (J. S. App. D, 42 a- 47 a). The District Court correctly recognized that if the I.C.C. decision is supported by substantial evidence it is not the function of the Court to re-weigh the criteria. *Merchants Warehouse Company* v. *United States*, 283 U.S. 501, 508 (1931) and further, that even if the criteria were to be re-weighed, appellant could not prevail (J. S. App. D, 44 a).

The factual evidence regarding the statutory criteria of Section 209(b) of the Interstate Commerce Act has been set forth and analyzed in detail by both the Administrative Law Judge and the District Court. The Administrative Law Judge found on balancing all of the criteria that it had not been established that the proposed operation will be consistent with the public interest and the national transportation policy and should therefore be denied (J. S. App. A, 32 a). A majority of the District Court found that there was substantial evidence to support that finding. Analysis of the Administrative Law Judge's Report and Order and the District's Court's Decision herein, clearly establishes that the action of the Interstate Commerce Commission is supported by substantial evidence and is correct as a matter of law.

Section 209(b) of the Interstate Commerce Act, sets forth the statutory standards to which the Commission must adhere when deciding applications for contract carrier authority. The crucial section provides in pertinent part:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of the shipper's requirements.

All of these five criteria should be weighed by the Commission in making its determination regarding consistency of the proposed operations with the public interest. This has been done by the Administrative Law Judge and reaffirmed by the District Court.

Regarding the number of shippers to be served by applicant, the Administrative Law Judge found that this criteria had been fulfilled by applicant (J. S. App. A, 28 a). The District Court concluded that applicant's presentation in this regard was "weak" rather than "strong", and went on to find that a determination of the weight to be given the first criterion is not within the Court's function and otherwise could not be found to overcome applicant's failure to satisfy other criteria (J. S. App. D, 44 a).

Regarding the nature of the service proposed, the Administrative Law Judge found the record to be fatally defective in establishing need for the proposed service (J. S. App. A, 29 a - 31 a). The District Court likewise analyzed applicant's evidence in this area and found it to be wanting (J. S. App. D, 44 a - 45 a).



The third criteria for consideration, the effect which granting the permit would have on the protesting carriers, was likewise subject to analysis by both the Administrative Law Judge and the District Court (J. S. App. A, 31 a, App. D, 45 a - 46 a).

Regarding the fourth area for consideration, the effect which denying the application would have on the applicant or its shipper, the Administrative Law Judge found that neither applicant nor shipper would be materially adversely affected (J. S. App. A, 31 a). This conclusion was also reached by a majority of the District Court after a review of the evidence (J. S. App. D, 46 a).

The final area for consideration involves the changing character of the shipper's requirements. Here the Administrative Law Judge concluded that this criterion was not a significant factor as the shipper's requirements were not marked by numerous or major changes (J. S. App. A, 32 a). The District Court in considering this matter found that applicant has again failed to support its position with substantial evidence (J. S. App. D, 46 a).

The District Court below correctly analyzed the decision of the Interstate Commerce Commission and the statutory criteria in finding that there was substantial evidence to support a denial of the application. That "substantial evidence" has been defined as follows:

> Substantial evidence is enough to justify, if trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury'. *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U.S. 57, 66 (1966).

Appellant now asks this Honorable Court to substitute its view concerning what should be done on the evidence of record for that of the Commission, *United States*

v. *Pierce Arrow Freight Lines, Inc.*, 327 U.S. 515, 536 (1946). This substitution of judgment is contrary to the conclusion reached by the Interstate Commerce Commission and a majority of the District Court.

## CONCLUSION

Appellee respectfully submits, therefore, that the Appellant has presented no substantial question for the decision of this Court, and that the decision of the District Court affirming the action of the Interstate Commerce Commission should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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Nos. 74-1477 and 74-1478

# In the Supreme Court of the United States

OCTOBER TERM, 1975

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FAST MOTOR SERVICE, INC., APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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FAST MOTOR SERVICE, INC., APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

---

*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*

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## MOTION TO AFFIRM

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 74-1477

FAST MOTOR SERVICE, INC., APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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No. 74-1478

FAST MOTOR SERVICE, INC., APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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*ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*

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**MOTION TO AFFIRM**

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and Interstate Commerce Commission move that the judgment of the district court be affirmed.

## STATEMENT

These are direct appeals from the final judgment[1] of a three-judge district court (No. 74-1477, J.S. App. D; No. 74-1478, J.S. App. E) affirming two decisions and orders of the Interstate Commerce Commission (No. 74-1477, J.S. Apps. A-C, 1a-40a; No. 74-1478, J.S. Apps. A-D, 1a-64a) which denied appellant's applications for contract carrier permits pursuant to Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b). Section 209(b) provides that in determining whether a contract carrier permit would be in the public interest "the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

In No. 74-1477, appellant sought authority to transport containers and related products manufactured by Continental Can Company between points in twenty-three central and eastern states under a yet-to-be-concluded contract. After a hearing before an administrative law judge, at which twenty-two carriers presented evidence in opposition, the judge concluded that appellant had failed to "establish the essential elements of a need for service" (No. 74-1477, J.S. App. A, 30a). The judge further found that "[i]n the absence of establishing what the shipper's actual need for service is, there is no way of determining whether the proposed

[1]No separate judgment was entered. The recitation of judgment appears on the last page of the decision (No. 74-1477, J.S. App. D, 49a; No. 74-1478, J.S. App. E, 73a).



operation is better tailored to meet the shipper's requirements than is [the service] offered by protestants" (*ibid.*). The administrative law judge also noted a lack of probative evidence with respect to the feasibility of appellant's performing the service (*id.* at 30-31a), found that granting the application could adversely affect other carriers and that denial will not have a material adverse effect on appellant or Continental Can (*id.* at 31a), and concluded that Continental Can's "requirements were not so marked by change as to make the criterion a significant factor" (*id.* at 32a). Adopting the findings of the administrative law judge, the Commission affirmed (*id.* at 36a-37a).

In No. 74-1478, appellant filed a similar application seeking authority to transport like commodities for the same shipper between points in thirty-seven south, central and eastern states, also under a yet-to-be-concluded contract. The Commission found[2] that appellant's presentation contained essentially the same defects as those described in the companion case (No. 74-1478, J.S. App. C, 61a).[3] The Commission noted particularly

[2]After a hearing at which twenty-six carriers opposed the application, a second administrative law judge concluded that appellant's application should be denied because the proposed service did not constitute contract carriage, but rather would have appellant operating as a common carrier (No. 74-1478, J.S. App. A, 44a-55a).

[3]The Commission found that granting the application would result in "diversion of traffic presently handled" by the protesting carriers and "would adversely affect their existing operations," while a denial "would not adversely affect applicant" and would have "little, if any, adverse effect" on Continental Can (No. 74-1478, J.S. App. C, 61a).

"that little probative evidence was presented to establish what specific service is needed, and as to just how, where, and to what extent the proposed operation would be used * * *; and that applicant has not shown that its proposal is better tailored to meet the shipper's requirements than that offered by protestants" (*ibid.*).

Appellant sued in the district court to set aside the Commission's orders denying its applications. In sustaining both orders (No. 74-1477, J.S. App. D; No. 74-1478, J.S. App. E), the three-judge court, with one judge dissenting, held that the Commission had properly given controlling weight to appellant's failure to make a sufficient showing with respect to the "nature of the service proposed" by the application. Observing that "[i]n effect applicant and the shipper are seeking the issuance of a permit, after which they will then determine where and when there is a need for service and the extent to which it will be employed," the court concluded that "[t]his is contrary to the regulatory scheme" and would not be " 'consistent with the public interest and the national transportation policy' as required by Section 209(b)" (No. 74-1477, J.S. App. D, 45a; No. 74-1478, J.S. App. E, 69a).

Although the district court concluded that the Commission had given controlling weight to appellant's failure to demonstrate the "nature of the service" (No. 74-1478, J.S. App. E, 67a-68a), it also examined the evidence with respect to the other statutory factors and found the Commission's findings to be supported by substantial evidence (*id.* at 67a-73a).[4]

[4]The court noted in No. 74-1477 that appellant's failure to make an adequate showing with respect to the service to be provided made it difficult to evaluate adverse effects upon other carriers and that the Commission did not give great weight to this factor, but the court did not re-evaluate the evidence on this point (No. 74-1477, J.S. App. D, 45a-46a; No. 74-1478, J.S. App. E, 69a-70a).



## ARGUMENT

This appeal involves the application of settled legal principles to the facts of this particular case and presents no issue warranting plenary consideration by this Court.

1. The decision below is consistent with this Court's decision in *Interstate Commerce Commission* v. *J-T Transport Co.*, 368 U.S. 81, which established the procedures to be followed in applying the criteria mandated by Section 209(b). The Court there held (*id.* at 90):

> The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet that specialized need. If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.

That procedure places the initial burden on the applicant to describe the "nature of the service" with sufficient precision to enable the Commission to evaluate the statutory factors. The Commission must have sufficient information to determine whether the proposed service is in fact tailored to the distinct needs of a particular shipper, to evaluate the protestants' ability to provide comparable service, and to measure the relative hardships to the applicant, the shipper, and other car-

riers that are likely to result from the grant or denial of the application. The Commission accordingly requires the applicant to provide considerable detail with respect to the nature of the proposed service.[5]

The Commission found in this case that this appellant did not provide a sufficiently detailed description of the nature of the service to be provided to satisfy its initial burden. The district court reviewed the record and concluded that the Commission's determination was supported by substantial evidence, and that the Commission acted rationally in giving controlling weight to this deficiency.

The district court's evaluation of the record is correct and a further reevaluation of the sufficiency of the "nature-of-the-service" evidence by this Court is unnecessary.

2. Appellant also disputes Commission findings in No. 74-1478 with respect to other statutory factors, particularly the Commission's characterization of the showing with respect to number of shippers as "weak" rather than "strong." The district court concluded that the Commission's characterization "is the correct one" (No. 74-1478, J.S. App. E, 67a) and properly observed that it is difficult "to see how the satisfaction of * * * [only one particular] criterion could be found to overcome plaintiff's failure to satisfy other criteria" (*id.* at

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[5]In *Midwestern Express, Inc., Contract Carrier Application*, 112 M.C.C. 624, 631, for example, Commission Review Board No. 3 held:

> [M]erely a *pro forma* showing is not enough. We believe applicant and shipper must establish with particularity the special transportation requirements of the latter's business, and describe in detail just how, where, and to what extent the proposed service will be used, to the end of providing a sound basis for the conclusion that shipper has specialized or distinct needs, to which applicant's operation is better tailored than the service of protesting carriers.



68a). The court also concluded that the Commission's findings and conclusion with respect to the other factors "are supported by substantial evidence in the record * * * " (*id.* at 73a). The sufficiency of the evidence with respect to subsidiary factors that were not determinative does not warrant plenary consideration.[6]

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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[6]Appellant claims that the Commission did not adequately articulate its reasoning (No. 74-1478, J.S. 21, 24). But, in view of the indefinite nature of appellant's proposed service, the Commission provided a sufficient "reasoned basis" for its decision. *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285.